LEGISLATIVE PROPOSALS TO IMPROVE TRANSPARENCY AND ACCOUNTABILITY AT THE CFPB

HEARING

BEFORE THE

SUBCOMMITTEE ON FINANCIAL INSTITUTIONS AND CONSUMER CREDIT

OF THE

COMMITTEE ON FINANCIAL SERVICES

U.S. HOUSE OF REPRESENTATIVES

ONE HUNDRED THIRTEENTH CONGRESS

SECOND SESSION

MAY 21, 2014

Printed for the use of the Committee on Financial Services

Serial No. 113–82

U.S. GOVERNMENT PRINTING OFFICE

88–544 PDF WASHINGTON : 2014

For sale by the Superintendent of Documents, U.S. Government Printing Office
Internet: bookstore.gpo.gov Phone: toll free (866) 512–1800; DC area (202) 512–1800
Fax: (202) 512–2104 Mail: Stop IDCC, Washington, DC 20402–0001

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LEGISLATIVE PROPOSALS TO IMPROVE TRANSPARENCY AND ACCOUNTABILITY AT THE CFPB

Wednesday, May 21, 2014

U.S. House of Representatives,
Subcommittee on Financial Institutions
and Consumer Credit,
Committee on Financial Services,
Washington, D.C.

The subcommittee met, pursuant to notice, at 2:03 p.m., in room 2128, Rayburn House Office Building, Hon. Shelley Moore Capito [chairwoman of the subcommittee] presiding.

Members present: Representatives Capito, Duffy, McHenry, Pearce, Posey, Fitzpatrick, Westmoreland, Luetkemeyer, Stutzman, Pittenger, Barr, Cotton, Rothfus; Meeks, Maloney, Hinojosa, Scott, Green, Ellison, Capuano, and Sinema.

Also present: Representatives Stivers and Mulvaney.

Chairwoman Capito. The subcommittee will come to order. Without objection, the Chair is authorized to declare a recess of the subcommittee at any time. And by way of warning, we are expected to be called for one vote here very, very shortly. So I am going to go ahead and start, maybe get our opening statements out of the way, and then we will recess for a short period, for just one vote.

I now recognize myself for an opening statement. This afternoon's hearing is a continuation of this committee's efforts to make the Consumer Financial Protection Bureau (CFPB) a more transparent and accountable agency. I would like to thank the sponsors of the legislation before us for their hard work in crafting commonsense reforms to the Bureau.

I would also like to highlight that some of the bills are the product of bipartisan efforts.

One of the items that we will consider today is the legislation that I have drafted that puts the Bureau on a level playing field with the other banking regulators. Much like the other Federal banking regulators, the Bureau is provided with the power to assess fines on supervised entities that are in violation of Federal laws or regulations. These fines are an important tool to discourage other market participants from engaging in similar practices.

Traditionally, these fines have been remitted to the United States Treasury, benefiting all taxpayers. However, unlike the other banking regulators, the Dodd-Frank Act requires the Bureau to retain these fines in a "civil penalty fund," and allows the Bureau to use these funds for consumer education financial literacy

programs. To date, the Bureau has collected nearly $125 million in fines.

Last year, we learned that the Bureau earmarked $1.6 million of these funds for administrative costs. My issue is not that the Bureau is collecting these fines. My issue is that the taxpayers would be better served if these fines were remitted to the Treasury to pay down the historic national debt.

My legislation simply states that funds currently held in the Civil Penalty Fund should be remitted to the Treasury, and all future fines levied by the Bureau should be remitted directly to the Treasury. This approach maintains the ability of the Bureau to fine the bad actors while providing a direct benefit to the taxpayers.

At this time, I would like to yield to the ranking member of the subcommittee, Mr. Meeks, for the purpose of making an opening statement.

Mr. MEEKS. Thank you, Madam Chairwoman.

And let me just say this first off. I just hope, as I review some of the bills, that we are not trying to, in certain ways, undermine or weaken or cripple the CFPB. I don't think that is the way to go, because if we are trying to slow it down or undermine the Consumer Financial Protection Bureau or the rights of average Americans to be protected from fraud or predatory or discriminatory financial practices, we will find that we are back to where we were.

I think that context does matter, and we need to learn from the past, from past matters. Just a few years ago, I can't forget that we were in the middle of a great recession because the financial sector had remained one of the major sectors of our economy where consumer rights had been neglected and treated as a stepchild among other financial regulatory issues. You don't have to go into how many foreclosures, et cetera, that we had.

I am always willing to work together. And I think that the CFPB has done some things, for example, like the small and rural lenders have received significant relief, and the QM rules, and nonprofit and philanthropic organizations, such as Habitat for Humanity, received relief for their financial products. Those are ways that the CFPB has worked continually to try to help and work together.

And with the internal process, there are ways that I am looking at. For example, I agree with the intent of H.R. 4262 from Representative Duffy and H.R. 4383 from Representative Pittenger to require the CFPB to establish a Small Business Advisory Board.

So my caution is that I feel concerned that some of my colleagues are looking to just undercut the CFPB. I have confidence in Director Cordray. And I want to congratulate the CFPB, for example, for last week's announcement with the Justice Department that it had reached a settlement against Sallie Mae for violating the legal rights of U.S. servicemembers in student loan servicing. And Sallie Mae was ordered to pay $96.6 million in restitution and penalties. This is just an example of how the CFPB works every day to protect vulnerable Americans and bring relief to them.

Chairwoman CAPITO. Thank you.

I now recognize Mr. Pittenger for 1 minute, please, for an opening statement.

Mr. PITTENGER. Thank you, Madam Chairwoman, for calling this hearing, and I appreciate the time to address this distinguished group.

At this time, we are to discuss H.R. 4383, the Bureau of Consumer Financial Protection Small Business Advisory Board Act. As the Consumer Financial Protection Bureau works to promulgate and implement new regulations affecting the American economy, it is vital that small businesses within the financial services sector have a seat at the table to voice their opinion.

That is why I have joined with Congressman Denny Heck to establish a Small Business Advisory Board within the CFPB. The mission of this Board will be to advise and consult with the CFPB on any new regulations coming forth and their effect on the small business community. The CFPB Small Business Advisory Board will consist of at least 12 members from the financial services community and will be appointed by the CFPB Director. In order to be selected to serve on the Board, members must represent a small business dealing with financial service products.

This is a bipartisan, common-sense piece of legislation that all Members should support. And I thank Congressman Heck for his strong support.

I yield back the balance of my time.

Chairwoman CAPITO. Mr. Green is recognized for 2 minutes for an opening statement.

Mr. GREEN. Thank you, Madam Chairwoman. And I thank the ranking member as well, and would associate myself with his comments.

I, too, am concerned about the possibility of our going too far. I do believe that there is room for improvement. But I am very much concerned about overreach. I recall what duration of time it took for us to get a Director for the CFPB in place. And I am always concerned about consumers, and I want to make sure that as we do this, we strengthen the CFPB. Transparency is great, and I look forward to helping with this, but I want to make sure that we strengthen the entity, that we don't eviscerate or emasculate it.

And with that, I will yield back the balance of my time.

Chairwoman CAPITO. I now recognize Mr. Stutzman for 1 minute for an opening statement.

Mr. STUTZMAN. Thank you, Madam Chairwoman.

I want to thank the Chair for holding this hearing to explore legislative proposals to improve transparency and accountability at the Consumer Financial Protection Bureau.

I also want to thank each of the witnesses for taking the time to lend their expertise today.

Today, we consider H.R. 4684, the Bureau Guidance Transparency Act, the bill that I have introduced to increase accountability when the CFPB issues guidance.

While guidance is supposed to be merely a restatement of law or a further explanation of a rule, there have been recent examples where the CFPB has gone outside of this scope. This bill requires a notice-and-comment period prior to the issuance of guidance at the CFPB and also has the CFPB show its work by providing any data or other analysis on which they relied. These are fair and rea-

sonable adjustments to avoid informal guidance substituting for formal rulemaking.

I want to thank Mr. Chapman for his testimony on possible further action we can take to make feedback on bulletins or guidance public on CFPB's Web site. I wholeheartedly support his idea, and I currently have draft language to do just that.

So I look forward to working with all of my colleagues to make this possible.

With that, Madam Chairwoman, I will yield back.

Chairwoman CAPITO. Thank you.

Mr. Ellison is recognized for 2 minutes.

Mr. ELLISON. Let me thank the chairwoman and the ranking member.

I am deeply proud of the creation of the Consumer Financial Protection Bureau. I believe Americans should have access to fair and appropriately priced financial products. And we know that information gaps between consumers and a financial product firm can be very large, and that can be to the disadvantage of consumers.

Let's also remember that the crash of 2008, that the root of it was a lack of consumer protection as relates to people in the mortgage market. And it is that problem that the Consumer Financial Protection Bureau was designed to solve, and many others.

So as we move forward with all of these bills, I hope we don't get the misimpression that the problem is the Consumer Financial Protection Bureau. The problem is the bad, irresponsible behavior that led to its creation.

There is a particular bill that I am concerned about, and I would like to point out first that more than $3.8 billion has been refunded to the 12.6 million consumers as a result of CFPB enforcement actions. This $3.8 billion is compensation to consumers who have been subjected to illegal practices.

Unfortunately, one of the bills—I think it is the Slush Fund Elimination Act—that we will consider today will prevent consumers from receiving financial redress and also stop providing funding for financial education. This would be very, very unfortunate. I would like to talk to my colleagues about this bill and others. But I certainly hope that at the end of the day, we don't find ourselves dismantling what is helping literally millions and millions of Americans, some of whom are not sophisticated people in the financial markets, some of whom are workaday folks who are just trying to save a little bit of money and get by and not get ripped off by people with considerably more resources than they have.

So I am looking forward also to having some dialogue about mandatory arbitration clauses. I would like to ask the members of the panel today about that. I yield back. Thank you.

Chairwoman CAPITO. I now recognize Mr. Westmoreland for 1 minute.

Mr. WESTMORELAND. Thank you, Madam Chairwoman. And thank you for including my bill, H.R. 4604, in the hearing today.

Last week, it came to my attention that contrary to testimony from the committee, CFPB will be collecting personally identifiable information, including Social Security numbers, financial account

numbers, telephone numbers, race, gender, religion, and even the GPS coordinates of your home.

My bill, H.R. 4604, the CFPB Data Collection Security Act, once again tries to stop some of CFPB's massive data collection by allowing consumers to opt out of all CFPB data collection. The provision has been modeled after the successful National Do Not Call Registry. H.R. 4604 also requires the CFPB to purge data after 60 days, and requires CFPB employees accessing personal data to obtain a confidential security clearance.

I don't know if the CFPB has intentionally misled this committee about the scope of their data collection, but I hope this committee will soon mark up H.R. 4604.

And thank you again, to the chairwoman and the ranking member.

Chairwoman CAPITO. For our next opening statement, we will go to Mr. Barr for 1 minute.

Mr. BARR. I want to thank Chairwoman Capito for including my discussion draft, the Preventing Regulatory Abuse Act, in this important hearing.

In talking with community bankers throughout Kentucky, one thing has been made clear to me, and that is the anxiety and frustration with the inconsistencies and uncertainties in bank examinations. I know the chairwoman is very familiar with this issue, having introduced the Financial Institutions Examination Fairness and Reform Act, and I appreciate her leadership on that important legislation.

I hope that we would all agree that a foundation of effective examination and enforcement and ultimately protecting consumers from unscrupulous behavior and preserving access to affordable credit is making sure that standards for what is permissible and not permissible are clearly defined and understood.

Unfortunately, Section 1031 of Dodd-Frank has added confusion to this area by broadening the longstanding UDAP standard to now include the ambiguous "abusive" term without providing clear guidance on its meaning. My proposed legislation is a good faith effort to try to provide constructive boundaries to this currently undefined "abusive" standard. And I would appreciate any thoughtful feedback on this discussion draft.

Thank you.

Chairwoman CAPITO. Thank you.

I now recognize Mrs. Maloney for 2 minutes for an opening statement.

Mrs. MALONEY. First of all, I would like to thank you, Madam Chairwoman, and the ranking member.

In just 3 years, the CFPB has made huge strides on a number of important consumer protections, from mortgage disclosures to helping veterans, seniors, credit cards, to remittance transfers. In the process, the CFPB has established itself as a thoughtful and data-driven agency. Its rule-writing process has won praise from industry and consumer advocates, Republicans and Democrats. The Bipartisan Policy Center described the CFPB's QM rule-writing process as "open, driven by data and research, and focused on practical application in the mortgage market."

So I am concerned and a little surprised, given the Bureau's record and their willingness to be open-minded, that some of the bills we are discussing today would hinder the Bureau's ability to conduct the necessary analysis to inform its rules. I describe it as a death by a thousand cuts, cut here, cut there, but put it all together and it will hinder tremendously the ability of the CFPB to be effective.

For instance, forcing the Bureau to define "an abusive financial practice" in just 15 days strikes me as almost reckless, that we all want them to be as careful and as thoughtful as possible in defining such an important term.

Additionally, I am concerned about proposals that would prevent the CFPB from producing high-quality research, because these research papers have helped to inform both the Bureau's own rules and our debates here in Congress.

So I am interested in hearing more from our witnesses about these proposals. And I yield back. Thank you.

Chairwoman CAPITO. Mr. Fitzpatrick is recognized for 1 minute.

Mr. FITZPATRICK. Thank you, Chairwoman Capito.

Any government agency that is purporting to be a data-driven organization should welcome the opportunity to operate in a more transparent manner. I have introduced the Bureau Research Transparency Act, which simply requires that research papers released by the CFPB include the studies, the data, and the analysis on which the paper was based. This is especially important in light of a pattern that has emerged in which the Bureau is engaging in rulemakings based on this research.

If the research is sound, and the need for a regulation is evidence-based, then let the Bureau make available the supporting data and methodology so that the public and also interested parties have the opportunity to review the CFPB's work. This legislation improves the CFPB's rulemaking process by ensuring that its policy prescriptions are supported by objective and unbiased research.

I look forward to the testimony. And I yield back.

Chairwoman CAPITO. That concludes our opening statements.

We have just been informed that votes are now pushed back another 5 or so minutes, so we are just going to soldier on here. And I appreciate your indulgence and your patience.

Each of our witnesses will be recognized for 5 minutes to give an oral presentation of your testimony. And without objection, each of your written statements will be made a part of the record.

Our first witness is Mr. Andrew Pincus, who is a partner at Mayer Brown LLP. Mr. Pincus?

STATEMENT OF ANDREW PINCUS, PARTNER, MAYER BROWN LLP, ON BEHALF OF THE U.S. CHAMBER OF COMMERCE

Mr. PINCUS. Thank you, Chairwoman Capito, Ranking Member Meeks, and members of the subcommittee. Thank you very much for the opportunity to appear before the subcommittee on behalf of the Chamber of Commerce's Center on Capital Markets Competitiveness.

Consumer protection is of course important for consumers, but it also is important for businesses. Legitimate companies are hurt when fraudsters lure away customers by using deceptive claims

and other marketing techniques that violate the law. And unfair practices can make consumers skeptical about all businesses and reluctant to participate in the market at all.

The fundamental job of a consumer protection agency is of course to protect consumers, but to do so in a way that allows law-abiding companies to understand the rules and to comply with them. That is the only way to promote competitive, efficient, and innovative markets, which of course provide crucial benefits to consumers. Particularly important, given the state of our economy, is that is the only way to ensure the availability of credit that is essential for small businesses to create jobs, for consumers to buy a home or a car, and for them to send their children to college.

I think everyone would agree that several years after the end of the recession, we continue to suffer from a lack of credit availability, particularly for small businesses.

Congress recognized the reality of this dual goal in the Dodd-Frank Act itself, authorizing the CFPB to exercise its authorities for the purpose of protecting consumers against illegal practices, and also for the purpose, and I am quoting, "of ensuring that markets for consumer financial products and services operate transparently and efficiently to facilitate access and innovation."

Sadly, in its nearly 3 years of existence, the CFPB's actions have not met this standard. First, for a number of critical legal standards, the Bureau simply refuses to provide clear rules of the road that would allow law-abiding companies to conform their conduct to the law. The subcommittee is very familiar with the Bureau's secret legal standard for indirect auto lending and its refusal to provide any clue about what makes a business practice abusive or the extent of supervision needed to protect a company against vicarious liability for the acts of a service provider. And the Bureau has consistently refused to implement a process enabling companies to obtain advisory opinions or other forms of informal advice, even though other Federal agencies have long had that method available.

Second, the Bureau frequently announces broadly applicable legal standards in guidance or in enforcement actions without first obtaining public comment to inform its decisions. The Bureau's view appears to be: seek public comment only when absolutely required to do so. That inevitably leads to bad decision-making, as the Bipartisan Policy Center explained in its recent report criticizing the Bureau for this practice.

Third, the Bureau seems to view statutory requirements as burdens to circumvent rather than restrictions that must be recognized. By using guidance rather than rulemakings, the Bureau can avoid the requirements of the Small Business Regulatory Enforcement Fairness Act that otherwise would apply, and require the Bureau to seek out and take into account the views of small businesses regarding the impact of its actions. And the Bureau has refused to employ the Small Business Regulatory Enforcement Fairness Act (SBREFA) process in guidance and other contexts, even though the impact of those actions on small business is significant.

By targeting indirect auto lenders, the Bureau can try to alter the practices of auto dealers, notwithstanding Congress' specific decision to expressly exclude auto dealers from the Bureau's jurisdic-

tion. By seeking data from 9 companies on credit cards rather than 10, the Bureau can circumvent the notice and comment and other requirements of the Paperwork Reduction Act.

Given this pattern of conduct, enactment of reasonable measures imposing clear rules designed to promote transparent, informed decision-making by the Bureau, such as the bills now before this committee, appear to be the only way to force the Bureau to follow the regulatory approach that Congress expressly specified in Dodd-Frank, and practices that are utilized as a matter of course by many, many other Federal regulatory agencies.

Thank you. And I look forward to answering the subcommittee's questions.

[The prepared statement of Mr. Pincus can be found on page 68 of the appendix.]

Chairwoman CAPITO. Thank you.

Our next witness is Ms. Hester Peirce, Senior Research Fellow at the Mercatus Center at George Mason University.

Welcome.

STATEMENT OF HESTER PEIRCE, SENIOR RESEARCH FELLOW, MERCATUS CENTER, GEORGE MASON UNIVERSITY

Ms. PEIRCE. Thank you. Chairwoman Capito, Ranking Member Meeks, and members of the subcommittee, it is an honor to be here today to talk about the Bureau's consumer financial protection.

The Bureau's logo is a spotlight. Unfortunately, the Bureau itself likes to operate in the dark. This penchant for darkness is in part a result of Dodd-Frank, which sought to make the Bureau independent of both Congress and the President. More fundamental changes, such as replacing the Director with a commission and putting the Bureau under congressional appropriations, would be necessary to address those problems fully. But incremental reforms can go a long way to help the Bureau do a better job of what its mission is, which is protecting consumers. And so, I would recommend holding the Bureau to standards of accountability and transparency and putting some constraints on their statutory discretion.

One way to add some accountability would be to put an inspector general in place who is devoted solely to the Consumer Financial Protection Bureau instead of sharing the job with the Federal Reserve. The Fed got a lot of new powers under Dodd-Frank, and so taking care of the Fed itself is a big job, let alone also covering the Bureau.

Another area in which the Bureau has been problematic is that its general approach is an enforcement-minded approach, and that is how it has approached its examinations as well. So, putting constraints on how the Bureau conducts its examinations, and reminding the Bureau that the purpose of an exam is not to find an enforcement action, the purpose is to work with well-intentioned companies to improve their compliance processes so that they work better and so that they protect consumers.

In the area of transparency, it is very important for the Bureau to be clear about what its intentions are so that again, well-intentioned businesses know what is expected of them and know what to expect from the Bureau. And the public, too, should be able to

have an eye into the Bureau to see whether it is doing the job of protecting consumers with which it was charged.

One thing that changed this week is that now the Bureau will be making public its Advisory Council meetings, which is a good change. In the past, they have been having these meetings behind closed doors. And that is very troubling, that other agencies all have to have these meetings in public, and they should do the same thing.

Another area where I have noticed problems is small banks have mentioned that one of their really big concerns is the lack of transparency at the Bureau. They are never sure what to expect from the Bureau. The Mercatus Center did a survey of small banks, and that was one of the big complaints that we got in the survey.

And another area in which transparency is necessary is the area of what data, what studies is the Bureau relying on in making its regulations. That is just good government, for an agency to let people know, here is what we looked at, here are the assumptions we made, here are the things we are uncertain about. And that leads to better public comment and leads ultimately to better rulemaking.

Because the Bureau has such wide statutory discretion, putting some restraints on how they exercise that is very important, whether that would be making them define terms before they start enforcing them, or whether that would be telling them, no, you can't set up a penalty fund that essentially is an extension of your budgetary authority. That is highly unusual, and it leads to very bad incentives for the agency. The agency's incentives then become collecting penalties because they can enhance their budget that way rather than collecting penalties because they have figured out that is the right penalty amount to collect.

And then another area in which constraints are necessary is the Bureau has been very aggressive in collecting data about individual consumers. And so, they are amassing huge amounts of data, very personal data, and data that is able to be tracked back to particular consumers. That practice should be reined in.

In addition—and the Bureau is not alone in this—the Bureau has not developed a good track record so far in using non-APA rulemaking methods to make rules. And that practice should be stopped early in the Bureau's existence.

So I would just close with the idea that holding the Bureau to high standards of accountability and transparency doesn't harm the Bureau's mission; it will make the Bureau a more credible regulator. It will make it more possible for the Bureau to go out and hold the industry to those same high standards. Thank you.

[The prepared statement of Ms. Peirce can be found on page 63 of the appendix.]

Chairwoman CAPITO. Thank you.

Our next witness is Mr. Rob Chapman, president, American Land Title Association.

Welcome.

STATEMENT OF ROB CHAPMAN, PRESIDENT, THE AMERICAN LAND TITLE ASSOCIATION (ALTA)

Mr. CHAPMAN. Chairwoman Capito, Ranking Member Meeks, and members of the subcommittee, good afternoon. My name is Rob Chapman, and I am the president of the American Land Title Association, and executive vice president and chief information officer for Old Republic National Title Insurance Company. I joined the company 18 years ago.

There is no doubt that the Dodd-Frank Act has increased the complexity of regulatory compliance. As we implement all of these rules and regulations, it has become clear that Congress needs to work in a bipartisan way to improve the regulatory process. The end result will be better compliance by businesses and stronger protections for consumers.

We agree with the Bipartisan Policy Center's report last year that when the Bureau operates in a transparent, open, and iterative manner, the results are generally positive. However, when the Bureau makes unilateral decisions, rolls out initiatives, rules, or processes in a more closed deliberation, the results are far more likely to be problematic.

Our industry experienced this with CFPB Bulletin 2012–03. It restated longstanding Federal guidance that banks and nonbanks must oversee their vendors. But unlike other regulators, the Bureau offered no additional direction to help banks and nonbanks effectively oversee the action of their vendors and left many open, unanswered questions about how to demonstrate compliance.

How this bulletin applies to our industry is also unclear because unlike a traditional bank vendor, consumers primarily choose their real estate settlement providers. To help our members fill this void, ALTA created a best practice framework for title and settlement companies. These are reasonable, prudent business practices. However, lots of uncertainty, varying practices and vetting procedures are predominant in lender-vendor management. We fear that some lenders will limit the number of vendors with whom they are willing to work, which will limit competition and hurt consumer choice.

A better outcome would have been a process where CFPB consulted to reduce these unintended consequences. An example of a more open and transparent process that worked well is the Bureau's rulemaking for integrated mortgage disclosure under Section 1032 of the Dodd-Frank Act. This includes a nine-round iterative process and a one-time small business review panel to ensure that the regulation was not overly burdensome on small business. My written statement outlines six commonsense ways the Bureau can make small business review panels more effective.

Other Bureau rulemakings did not use the small business review process, but probably would have been better off if they had, including the Qualified Mortgage rule. These panels encourage collaboration to produce better outcomes for consumers and business.

Another good example of how a transparent and open process results in better outcomes for business and consumers is the Bureau's recently released study entitled, "Mortgage Closings Today: A Preliminary Look at the Role of Technology in Improving the Closing Process for Consumers." Released last month, this highly credible research identifies four key pain points for consumers and

industry and was the result of ample input, including interviews, an opportunity for public comment, and demonstrations with technology vendors. Open and transparent processes like this one led to a good outcome for consumers and our members.

Based on these experiences, ALTA recommends that Congress work in a bipartisan way to improve outcomes for consumers and businesses in three ways.

First, Congress should pass H.R. 4383. This bipartisan legislation by Representative Pittenger and Representative Heck would establish a Small Business Advisory Board at CFPB, similar to those already established for community banks and credit unions. They provide clear, formal, and open channels of communication between the Bureau and the industry.

Second, direct the CFPB to issue advisory opinions. An advisory opinion provides greater certainty to those of us who comply with Federal consumer financial law in real-life situations. Consumers will see better outcomes if the Bureau spends more time advising people in industry how to best follow the law.

Finally, encourage public feedback on draft policy statements, bulletins, and other guidance documents. Public comments ensure the final documents are useful and understandable to industry, provide a safety valve to reduce unintended consequences, and produce better policy outcomes for consumers and industry.

Thank you for inviting me to testify. I am happy to answer any questions that you may have.

[The prepared statement of Mr. Chapman can be found on page 42 of the appendix.]

Chairwoman CAPITO. Thank you.

Our final witness is Mr. Ed Mierzwinski, who is the consumer program director of the United States Public Interest Research Group.

Welcome.

STATEMENT OF EDMUND MIERZWINSKI, CONSUMER PROGRAM DIRECTOR, UNITED STATES PUBLIC INTEREST RESEARCH GROUP (U.S. PIRG)

Mr. MIERZWINSKI. Thank you, Chairwoman Capito, Ranking Member Meeks, and members of the subcommittee.

U.S. PIRG, by the way, is the witness today. But I want to point out that Americans for Financial Reform and six or seven other consumer groups recently sent up a letter that I would like entered into the record, if possible, that opposes all the bills on this docket today.

U.S. PIRG opposes all 11 proposals before the committee. We do not think they are necessary to protect consumers. None provide any necessary oversight function. Some roll back important authorities of the CFPB, particularly the McHenry proposal, giving the CFPB the authority to ban or regulate forced arbitration. And finally, others will subject the Bureau to enormous regulatory burden and litigation risk and raise the cost of government.

Also, most of the bills only—in fact, I think all of the bills only apply to the CFPB. None apply to the other regulators. And we don't think that is a good idea.

Instead of enacting these bills, we would urge you to take a look—why don't you have a hearing on the achievements of the CFPB? It would be a long hearing because they have done tremendous work. They have saved billions of dollars. They have helped military families. They have educated students. They have helped families wanting to send money overseas. They have done tremendous work. It is just a very successful agency, and I would encourage you to look at that side of the agency at some point.

At the same time, the CFPB is a work in progress. It is a baby agency. It is a startup, and it is less than 3 years old, still growing. It has growing pains. In response to some legitimate oversight by this committee, it has announced new changes on staff evaluations; new changes, as noted by other witnesses, on its disclosure of information and the openness of its committee advisory board. So we don't think the agency needs new legislation to continue to do the good work that it is doing.

I am going to quickly do the lightning round on all of the bills. I want to spend a little bit of time on the Bureau Arbitration Fairness Act, which of course should not be confused with Representative Henry Johnson's Arbitration Fairness Act. Consumer groups support that bill because it bans arbitration.

We don't oppose all arbitration. We only oppose forced arbitration. Let me make that clear. Consumer groups allow for the choice of arbitration after a dispute has already arisen. In the CFPB's research on arbitration, research that contrary to the Chamber's testimony has been open and transparent and many members of the Chamber, many members of industry have marched in and out of the CFPB as part of the research into that bill, the CFPB looked at some major class action lawsuits involving bank fraud, where banks were tricking consumers into paying extra overdraft fees. And the CFPB found that class action lawsuits on behalf of consumers had recovered hundreds of millions of dollars for consumers.

The CFPB also looked and found that only two consumers—two consumers—had actually used the arbitration process individually to try to protect themselves. So arbitration on the one hand is a system that favors corporate wrongdoers, and the private rights of consumers to go to court buttress the work of the CFPB, the work of Federal laws, and the work of State attorneys general to make markets work. So we oppose that bill.

Regarding your bill, Madam Chairwoman, I have to disagree. We oppose the CFPB Slush Fund Elimination Act. The purpose of the CFPB's authority to take extra civil penalty money and use for it other purposes is twofold. First, when you have a financial fraudster who spends all the money that he stole, the CFPB can make his victims whole. And that is what it has done with the money. Second, if you have extra money left over, the CFPB has targeted the money to another important constituency that this Congress has given it: to protect military widows and widowers. That is financial literacy. That is what the CFPB wants to spend this extra money on. It doesn't want to spend it on anything to aggrandize the purpose of the agency.

I think that they are a remedial agency, and they should have the authority to do remedial things. They are different than other agencies because they were set up to protect consumers.

The rest of my testimony goes through all the other nine bills. I am happy to answer questions to talk about any of them. I respect the committee's authority to conduct oversight. Again, your oversight has already resulted in the CFPB doing things to make changes as you have requested.

And finally, I would just close by saying, to quote the late environmentalist Edward Abbey, I think the idea of the CFPB needs no defense, only more defenders. Thank you.

[The prepared statement of Mr. Mierzwinski can be found on page 52 of the appendix.]

Chairwoman CAPITO. Thank you.

I want to thank you all for your testimony. And I will begin the questioning. But before I do, I will take the letters, Mr. Mierzwinski, and ask that they be entered into the record. Without objection, it is so ordered.

And without objection, the following statements will be made a part of the record: the National Association of Federal Credit Unions; and the Credit Union National Association. Without objection, it is so ordered.

I would like to talk about my bill, the Slush Fund Elimination Act. There is $96 million in that fund right now.

And I would like to clarify for Mr. Ellison, we are kind of talking about two different things here. Not kind of. We are. And my bill would not eliminate at all any ability for the CFPB to remunerate or make restitutions to any victims. That is explicitly written into the bill. It is the rest of the money that I am concerned about. It is sort of sitting there, accounted for, yes, but with the only specific purpose to go to financial literacy.

I am not opposed to financial literacy. We had a financial literacy hearing just, what, 2 weeks ago, and we found that there are financial literacy programs throughout the government that have no coordination, some accountability, but it is sort of diluted resources. And I think we can do a much better job in that in coordination with the private sector. There is lots going on the private sector in the arena of financial literacy, and I certainly agree there is much more that we can do.

So I would like to see whatever is left in that civil penalty, rather than be in what I am calling a slush fund, because that is how I identify it, to go to help to eliminate the enormous debt that we have, after all of the victims have been paid, after a certain period of time, and all that is cleared out.

So I would like to ask Mr. Pincus if you have an opinion on the Civil Penalty Fund and what it is used for and the transparency, because the Bipartisan Policy Center issued a report last fall that was critical of the transparency and suggested that it be used for other purposes. So do you have a comment on that?

Mr. PINCUS. I do. Thank you, Madam Chairwoman.

A couple of things. I think, first of all, it is important to point out how unique this is in an agency that is already unique. First of all, the CFPB's budget is already quite unique because it gets a $600 million-plus check from the Federal Reserve without any

oversight or prior approval by the Congress or the President about how it is spent. The Director has sole discretion to decide how to spend all of that money, escalated for inflation.

So the CFPB already has a lot of money that it decides for itself without prior approval by anybody how to spend. And what is happening here is yet another pot of, as you say, almost $100 million that is sitting around waiting for them to decide how to spend it.

And I think it is just troubling that in an era of fiscal scarcity and deficits, as you said, there is this money that will be disposed of not to compensate victims, but for other purposes, without any review by the Congress, by the President, coordination with other programs, just as the CFPB decides. That is quite extraordinary.

And I think it is also quite extraordinary, as one of my fellow witnesses said, when you think of the fact that civil penalty decisions, which have a lot of discretion in them, should be based on whether the punishment fits the crime. They shouldn't be revenue-raising devices. But if it is a fund that the Bureau has the ability to spend for all kinds of different purposes, that creates a very skewed incentive system that is dangerous.

Chairwoman CAPITO. I would make note, too, that in the accounting from the CFPB, they have used this for administrative costs of $1.5 million.

Mr. ELLISON. Would the chairwoman yield? I'm sorry, Madam Chairwoman. I seek recognition because you specifically mentioned me.

Chairwoman CAPITO. Okay.

Mr. ELLISON. I just wanted to note that in the bill, your bill, the slush fund bill, which I think is very unfortunately named, from that—

Chairwoman CAPITO. Could you make it quick? Because I only have a minute.

Mr. ELLISON. I will. From the fund that you want to eliminate in your bill, on November 29, 2013, in accordance with the Civil Penalty Fund rule, the Bureau allocated $499,000-plus to two eligible classes of victims from the American Debt Settlement Solutions, Inc., case, and $2 million-plus to eligible class victims from the National Legal Help Center case.

Chairwoman CAPITO. Okay.

Mr. ELLISON. I mention that because you seemed to imply that all this money is only for education purposes.

Chairwoman CAPITO. I would like my time back.

Mr. ELLISON. But the victims have been compensated from this fund. I yield back.

Chairwoman CAPITO. If you were listening to me, I said specifically that the money goes to the victims and what is left after that, which is now $100 million—

Mr. ELLISON. Well—

Chairwoman CAPITO. I am going to claim my time here, because I don't have much left. So, that is what I am getting at.

Mr. ELLISON. You are incorrect, Madam Chairwoman.

Chairwoman CAPITO. I have the accounting right here.

And in any event, I would also note that—and I started on this—the administrative cost for this has already been $1.5 million. If the Bureau has $600 million to operate on, why do they need to

take out of the Civil Penalty Fund another $1.5 million for their administrative costs?

With that, I yield back.

Mr. Meeks is recognized for 5 minutes.

Mr. MEEKS. Thank you.

Let me first find out and ask Mr. Pincus, do you think there is a need for the CFPB?

Mr. PINCUS. I think the purpose of consumer protection is important. I think Congress could have done it different ways.

Mr. MEEKS. That is not my question.

Mr. PINCUS. It established the CFPB. And I think the consumer protection role that it is performing is important.

Mr. MEEKS. That is not my question. My question is a simple one, you can say yes or no. Do you think there is a need for the CFPB? Yes or no?

Mr. PINCUS. Yes.

Mr. MEEKS. Ms. Peirce?

Ms. PEIRCE. No. Its functions could be done by other agencies.

Mr. MEEKS. Mr. Chapman?

Mr. CHAPMAN. Yes.

Mr. MEEKS. Mr. Pincus, since you think that there is a need, are there any objections you have to any of the proposed bills, the nine bills that are before us, do you agree with all of them or disagree with any of them?

Mr. PINCUS. I think there are some details on some of them that I think we would like to talk about. But if I could just expand on my yes-or-no answer to your prior question, I think there is a need for the CFPB. The unfortunate thing that happened when it was created, the original proposal of course was that there would be one Federal agency that would deal with consumer protection for all kinds of businesses that engaged in financial activities. We didn't have that, as it turned out. The FTC kept all of its authority over this activity.

Mr. MEEKS. Reclaiming my time, let me just say this. Because we have talked about all of the consumers who have been protected now, some reimbursed because of the bad practices. And we should have learned, because, you know what? Had there not been the fraud and the misleading that took place in the first place that caused us to have the financial crisis that we have had, we wouldn't be talking about a CFPB now. We are talking about it because of what we learned. And that is the reason for it. That is why I am shocked Ms. Peirce has indicated there is no need for it when, in fact—

Mr. PINCUS. If I could say, Congressman, I said there was a need for it.

Mr. MEEKS. Well, Ms. Peirce said there is no need for it.

Ms. PEIRCE. May I elaborate on that?

Mr. MEEKS. In a second. Because when we look at what has taken place, if everything was fair then I would agree. But we have witnessed individuals where, in fact, people lost—there were over 10 million foreclosures, 8 million jobs lost, trillions of dollars of wealth lost. And nobody was there to protect these individuals. That is why we have the CFPB.

And I am trying to find out, and if anybody says that they are for it, yet there is not one of these bills that is being proposed, which is clearly cuts that is intended to get rid of the CFPB, as Mrs. Maloney said, it gets into what the motivation is. Do we want to protect consumers?

Mr. PINCUS. May I elaborate? I think I can answer your question. These bills basically impose on the CFPB practices that are routine for other Federal agencies. Every agency has their own IG, every agency except for the Federal Reserve and the CIA has to abide by FACA. Many other agencies have advisory opinion processes that are in place. The FTC and the SEC are role models of getting input before they issue guidance. The CFPB doesn't do any of these things.

Mr. MEEKS. I am running out of time.

Mr. PINCUS. These are procedural changes that would bring it into line with those other agencies.

Mr. MEEKS. I am running out of time.

Because all of those agencies existed, yet still the consumers did not have a voice. They did not have a voice until we had the CFPB.

Let me just ask really quick, Mr. Mierzwinski, I am just looking at H.R. 464, for example. How feasible would it be for the Bureau to comply with a requirement to not collect personally identifiable information about a consumer if the consumer chooses to opt out of being eligible for data collection? Doesn't that go against the very nature of how the CFPB is supposed to work and collect data to protect the most vulnerable? Isn't it the same information that most banks have?

Mr. MIERZWINSKI. Absolutely. The banks already have that information. I am unaware of any of the studies that the other Representative pointed out that claim that the CFPB is collecting all this detailed information. In most cases, the CFPB does not collect personally identifiable information unless the consumer has opted in, for example, in a complaint.

Mr. MEEKS. I see I am running out of time, and I heard the bells ring. We are going to have a vote.

So let me just ask again: You talked about the Civil Penalty Fund. How would that impact consumers if they didn't have the money to pay out to the consumers for their being defrauded?

Mr. MIERZWINSKI. May I answer?

Chairwoman CAPITO. Yes. Quickly, please.

Mr. MIERZWINSKI. Very briefly, it is my understanding that Section D eliminates civil penalty funds and requires them all to be put into the general fund. That is my reading of the bill. And I would be happy to talk to your counsel about their reading of the bill, Madam Chairwoman.

Chairwoman CAPITO. Okay. With that, this is what I am going to do, if we can work this out. I want the full attention of the membership. Since we only have one vote, what I would like to do is keep this rolling. So Mr. Duffy is going to come to the Chair. I will go vote and come back. Is that satisfactory to the rest of the committee?

So we are going to go with Mr. McHenry. Do you want to question?

Mr. MCHENRY. Yes. Am I now recognized? I will take that as recognition.

My bill is a very simple one. And I want to ask you, Mr. Pincus, a few questions about arbitration and the utilization of arbitration. We have a fairly long history in this country with arbitration being in statute, in Federal statute. So why is arbitration important?

Mr. PINCUS. Arbitration is important because it is a quicker, cheaper, and more efficient way of resolving many kinds of disputes, especially, as members of the Supreme Court have said, the kind of small, individualized disputes that many consumers have.

As you know, our courts, especially small claims courts, have incredible budget pressure, are overcrowded. They are just not a realistic option for real people who have real disputes and are trying to get someone to decide them. You have to go to court, you have to file papers. You almost always have to have a lawyer. Arbitration today you can do online or over the phone. It doesn't have to be done in person. It is an informal process. And it is a way for people to get their disputes—

Mr. MCHENRY. Is arbitration harmful to consumers?

Mr. PINCUS. I think arbitration is beneficial to consumers because it gives them a way to get their disputes to a decision-maker and courts don't.

Mr. MCHENRY. Okay. So, is this a constitutional question? Is it a debatable constitutional or dubious under the Constitution for arbitration to exist? Or is this a policy debate?

Mr. PINCUS. This is a policy debate. The current law is clear. The Federal Arbitration Act protects the enforceability of arbitration agreements. The reason we have this policy debate is that Dodd-Frank gave the Bureau the power to first investigate arbitration and then regulate it. But this is totally a policy question.

Mr. MCHENRY. So is the Dodd-Frank Act a departure when it comes to arbitration?

Mr. PINCUS. Yes, it is a significant departure in terms of creating the possibility that these claims will be placed off limits to arbitration as opposed to the Federal Arbitration Act's rules which apply generally across-the-board.

Mr. MCHENRY. So it is a departure of longstanding Federal policy? Is that correct?

Mr. PINCUS. There have been a few other areas in Federal law where Congress has taken that step, but a very, very few.

Mr. MCHENRY. Okay. Is there an incentive for the CFPB to release a study on arbitration that shows that consumers are harmed by arbitration?

Mr. PINCUS. If the Bureau wants to eliminate arbitration, obviously the way to do it is to conduct a study that concludes that arbitration is bad for consumers. And what is troubling about the preliminary results that the Bureau released at the end of last year is that it seemed as if they were focused on a lot of the wrong questions and not on a lot of the right questions, which is, for a consumer, what is a realistic way of getting a dispute resolved, as opposed to what is good for lawyers, what is sort of the traditional way things have been done in the legal system?

Mr. MCHENRY. Okay. So you undertook a study on arbitration. And what did that study find?

Mr. PINCUS. We undertook two studies. We undertook to gather as much of the outstanding information about arbitration that we could find. And what we found was the results, which seemed to be the most important thing, do consumers or people situated like them get as good results in arbitration as they do in court. And the answer from the studies was a resounding, yes, they do.

Is arbitration supervised to make sure that a maliciously minded company couldn't construct an unfair arbitration clause? And it is, under generally applicable contract unconscionability rules. Courts invalidate unfair arbitration clauses all the time. If the company general counsel is going to be the arbitrator, guess what? That arbitration clause isn't going to be enforced.

The other study we did, because a lot of the debate about arbitration comes down to class actions, frankly—

Mr. MCHENRY. And the trial bar.

Mr. PINCUS. And plaintiffs' lawyers who embark on class actions. And so the question is, even if arbitration gives more justice for individualized claims, because arbitration is one by one, you are taking away class actions, and that outweighs the expanded justice for individual claimants.

And so we looked at a neutrally selected group of class actions and found, of the ones that had decided, two-thirds gave nothing to the class. The one-third that were settled, and they were all settled, produced settlements that, frankly, you couldn't trace because the big secret in class actions is there is a headline that says $250 million settlement, but as we all know from getting those forms in the mail or seeing them in the paper, you have to file. And what is never revealed is how many people file and how much of that $250 million is distributed to real people, how much goes either back to the defendant or to some charity that the judge and the defendant and the plaintiff's lawyer all pick together. And the sad fact is, of the ones we could find, a huge percentage, 99.9 percent in some cases, does not go to the consumers.

Mr. MCHENRY. Thank you.

Mr. DUFFY [presiding]. The gentleman yields back.

The Chair recognizes Mr. Ellison from Minnesota for 5 minutes.

Mr. ELLISON. I thank the Chair and the ranking member.

Let me start by asking you this, Mr. Mierzwinski. Does the Civil Penalty Fund, which would be eliminated by Chairwoman Capito's bill, does that bill help consumers when the business that has taken advantage of them and been found to be wrong doesn't have the wherewithal to pay out?

Mr. MIERZWINSKI. That is absolutely the purpose of the fund. And the way that it has worked so far is it has given, I think, about $13 million to customers of bankrupt financial fraudsters who otherwise would not receive any money.

So in the examples of this big credit card add-on cases, the CFPB has sued five big credit card companies for misleading add-on identity theft and debt cancellation products. In the most recent Bank of America case just a month or so ago, they recovered $727 million for consumers directly.

But there have been a number of other cases where they have imposed civil—and then they had about $100 million civil penalty on top of that. That civil penalty goes into the fund because there

are a number of small-time financial fraudsters who might have ripped off 10,000 or 50,000 consumers but don't have the money like Bank of America has. That is the main purpose of the money.

The secondary purpose is to help military widows and widowers and others at risk of being financially at risk, and so they are going to increase their financial literacy.

And by the way, Mr. Ellison, it is not a unique fund. The Department of Justice has a similar fund.

Mr. ELLISON. Now, if that fund were eliminated, as it would be with Representative Capito's bill, what would happen to those consumers in the case where the people who defrauded them or the business that defrauded them doesn't have the money to be paid out? What relief would they have?

Mr. MIERZWINSKI. I respect the purpose of her bill to put money to help taxpayers. But it would hurt victims.

I would urge, instead of her bill to help taxpayers, a better solution is something that my organization supports. And we have met with many agencies, including the CFPB. When an agency signs a settlement agreement, it should prohibit companies from taking a tax write-off on any settlement agreement with the government.

Mr. ELLISON. We need to pursue that in any case.

Now, if a business is able to take advantage of consumers and then just doesn't have the money to pay them out, what message does that send to other people who might be looking to make a quick buck at the expense of consumers with fraud and deception?

Mr. MIERZWINSKI. These are so-called last-dollar scammers. They even often go after people who are already in financial trouble. They don't care, and they will be encouraged.

Mr. ELLISON. Let me just say that I would like to introduce for the record an article entitled, "You won't believe your bank's newest fee. Suing your bank? Prepare to pay up. Thought ATM, overdraft and bounced-check fees were bad? Banks want to fine for you beating them in court."

Mr. Pincus, I would like to just ask you a general question before we run out of time. I mean, we are at bottom talking philosophy here. And I am a person who owned a business, and was very proud to be a business owner. And I just thought that if I did a good job for my consumers and I charged them a fair price, then that would be good. And the other businesses that are trying to get over on consumers and not do a good job, I don't want them in the business. I want to get rid of these people.

But you seem to be arguing for the bad guys. Why don't you want to have a business community with people who want to give a good product at a fair price and get rid of all the other bad ones? Why don't you want that?

Mr. PINCUS. As I said in my opening statement, Congressman, I absolutely agree with you. And that is why I think consumer protection is important, that the CFPB's purpose is important. But the problem is, if you are a legitimate company—

Mr. ELLISON. Wouldn't you agree that we are here today because we had a massive financial collapse in part due to people being taken advantage of in bad mortgaging, bad consumer practices? Would you agree with that, in part?

Mr. PINCUS. I think, in part, we could quarrel about that part. But if I could finish my other answer. I think what is critical here for legitimate businesses is what they want to know is what do I have to do to be law-abiding? I don't want to engage in an abusive practice. What is abusive? So I can build a compliance system that doesn't violate the rules. What can I do—

Mr. ELLISON. Thank you, Mr. Pincus. I got my red light. I do need to try to get some things in for the record. I appreciate your answer, sir.

There are three articles I would like to introduce into the record, without objection: a Washington Times article, "Mandatory Arbitration Replaces Litigation, Consumers Lose;" and "Protect the Rule of Law and Arbitration Now."

Mr. DUFFY. Without objection, it is so ordered.

Mr. ELLISON. I think my time is up, so thank you, Mr. Chairman.

Mr. DUFFY. The gentleman yields back. The Chair now recognizes himself for 5 minutes.

I had one of the bills up today that provides access for the public to the Consumer Advisory Committee meetings. I tried to attend one of those meetings and was advised, per the staff of the CFPB, that Congressman requests would not be accommodated.

We just found out yesterday that the CFPB has changed course and thought that transparency would be the best course and are now going to allow the public access to those meetings. They are diverting from the course of the CIA and the Federal Reserve. So I am sure you all know that, but I am pleased.

But I guess, Ms. Peirce, to you, do you think we still need to go forward with legislation? I guess I would tell you, I have some concerns that it took us this much effort and this long to get the CFPB to agree to open up these meetings. Do you think we still need to go forward with legislation or do you think now they have seen the light and this issue is behind us?

Ms. PEIRCE. Even before yesterday, they said that they complied with the FACA in spirit. And so, that seems to be a selective compliance. The problem with an agency that is run by a single director is that it runs on the whim of the director, so what they felt yesterday might not be what they feel next week.

Mr. DUFFY. So you would agree that a legislative fix is still warranted? I don't think it is necessary, but based on their interpretation.

Ms. PEIRCE. If you put something in legislation, it is harder for them to ignore, although they might try.

Mr. DUFFY. I would agree.

I want to change course to Mr. Westmoreland's bill. I have a real concern on data and the information that has come out in regard to the CFPB's collection of data, but more recently, what has been told to us by the FHFA on the kind of information and data they are going to be collecting in conjunction with the CFPB.

I guess, Mr. Mierzwinski—hopefully I didn't slaughter your name—do you agree that if we want to empower consumers, we should give consumers an opt-out provision to make sure that government doesn't have information on how they spend, when they spend, their race, their religion, their kids, that the government

should not have all this data without their permission or consent? Do you agree with that premise?

Mr. MIERZWINSKI. Mr. Duffy, I don't know any consumer or privacy organization that has endorsed the proposals to rein in the CFPB's use of data. I think nobody is concerned about the government agency's use of data. They are confident that it will protect it.

Mr. DUFFY. Let me stop you there.

Does anyone else on the panel have a concern about the data collection going on by the FHFA and the CFPB?

Ms. PEIRCE. I am absolutely concerned, and I think, given the amount of information the Bureau already has, and the amount that the FHFA wants to add to that pile, they are going to have very specific, very personal information about a lot of Americans. And I think a lot of Americans would want to opt out of that.

Mr. PINCUS. Yes, just last week the Chamber filed comments with the FHFA raising these issues. And I am surprised to hear, given everything that has happened with the NSA and data collection, that anybody wouldn't be worried about a government agency collecting a lot of data, especially one where there have been concerns by the GAO and others about data security.

Mr. DUFFY. And I have to tell you, what surprises me is usually we see liberal outrage. Traditional liberals see government and its expansion, especially into the privacy of others, that is an affront to liberal principles. And oftentimes we see liberals now coming forward and saying, no, this is actually a good thing, that the government should have this kind and this amount of information on Americans.

I guess I would submit a question to the panel. Doesn't it change the fundamental relationship that the citizenry has with the government when the government has this much information on them?

Mr. Pincus?

Mr. PINCUS. I think it is concerning, and I think it is very worrisome. Obviously, there are some targeted reasons that government needs targeted information.

Mr. DUFFY. I agree.

Mr. PINCUS. The construction of very large databases that are going to be permanent and accessible by a lot of people, I think, is very worrisome.

Mr. DUFFY. I am going to rephrase my question as I have 45 seconds left. If we are here to protect consumers—and that is the objective of the Consumer Financial Protection Bureau—why wouldn't you give the consumer an opt-out if that is who you are here to protect?

Ms. Peirce?

Ms. PEIRCE. I agree with that. I think the standards that the Bureau wants applied to itself are very different than the standards it wants applied to anyone else.

Mr. DUFFY. Very good.

And, Mr. Mierzwinski, why does the CFPB need to know a consumer's religion?

Mr. MIERZWINSKI. I wouldn't venture to guess why the CFPB needs to know that except to say that the CFPB is not trying to

study individual consumers. The CFPB is trying to study markets, and it feels that information could help it.

Mr. DUFFY. And what does religion have to do with markets? No good answer, right? You shrug your shoulders?

Mr. MIERZWINSKI. As far as I know, Congressman, there are many faith-based organizations that are in the market and there are many companies that are faith-based, so it might matter.

Mr. DUFFY. Very well. My time has expired. I don't see that we have any Democrats.

We will now go to the gentleman from North Carolina, Mr. Pittenger.

Mr. PITTENGER. Thank you, Mr. Chairman.

Mr. Chapman, you have been in business for 18 years, I believe I heard?

Mr. CHAPMAN. Yes, sir.

Mr. PITTENGER. Small business. You have seen a lot of transitions, I am sure, in the role of the Federal Government. Do you believe that the voice of small business is sufficiently represented at this time on the Bureau?

Mr. CHAPMAN. I do not.

Mr. PITTENGER. What would you recommend could be done to ensure that small business does have a voice?

Mr. CHAPMAN. In the industry that I represent, the majority of those members of our association are small business people. And they need to have a voice in which they can communicate their concerns with the Bureau and be able to articulate the real world activities that are brought down.

Mr. PITTENGER. What actions taken by the Bureau, Mr. Chapman, have impacted your business?

Mr. CHAPMAN. As an example, when the first CFPB 2012–03 came out, we didn't know directly how it affected our business. So we are out here trying to slay dragons with no idea of what we are trying to thwart off. So from the title insurance settlement world, we are not directly regulated by the CFPB, but those that we serve, the lender community, have a great deal of regulatory environment that we need to be adherent to. So it was very, very hard for us to try to understand how we would keep our members relevant and continue to have them be applicable with the new regulations.

Mr. PITTENGER. So do you feel, Mr. Chapman, that you and other members of ALTA are sufficiently represented, then, on the Bureau before they took these kind of actions?

Mr. CHAPMAN. I think we have a great relationship with the Bureau, but I think there could be better representation if there was a small business panel.

Mr. PITTENGER. Thank you.

Ms. Peirce, it has been argued that small businesses have a voice into the CFPB's decision-making processes through the SBREFA process. Are you aware of occasions that CFPB has ignored this requirement based upon a technicality?

Ms. PEIRCE. I think it was on the QM rulemaking that they said they didn't need to have a panel because the original proposal was done by the Fed as opposed to the Bureau. And to me, that indicates just a willingness to live and die based on technicalities rath-

er than really seeking the input of small businesses, which should be what you would think the Bureau would want to have.

Mr. PITTENGER. Did the CFPB agree to convene a SBREFA panel?

Ms. PEIRCE. They did not for that rulemaking. They have for others. But, again, it is not something that they do willingly.

Mr. PITTENGER. Ms. Peirce, if the CFPB has the power and the authority to ignore the law requiring that it listen to small businesses, should we provide small businesses with another avenue to ensure that their voices are heard at the Bureau?

Ms. PEIRCE. I think that giving small businesses more avenues to speak to the Bureau will lead to their concerns being taken into account.

Mr. PITTENGER. Thank you.

Mr. Chapman, one more time. Are small businesses exempt from the CFPB's supervision and examination?

Mr. CHAPMAN. Yes, they are.

Mr. PITTENGER. Then, how do the decisions of the CFPB that are intended for the largest companies end up affecting small business?

Mr. CHAPMAN. Unintended consequences of not having representation.

Mr. PITTENGER. So you would be in support of the bill that we have offered, H.R. 4383, the Bureau of Consumer Financial Protection Small Business Advisory Board Act?

Mr. CHAPMAN. Yes.

Mr. PITTENGER. Thank you, sir.

Mr. Pincus, do you have any comments to offer on this?

Mr. PINCUS. While the Chamber is also very supportive of increasing the voice of small business at the Bureau, as I said in my written statement and in my opening statement, there is a lot of concern that because the Bureau's approach has been to only use rulemaking when it is absolutely required, and because SBREFA only applies to rulemaking, there are a lot of decisions that the Bureau is making in its so-called guidance and other areas where there is no voice of small business heard at all, and that is a terrible problem.

Mr. PITTENGER. Thank you.

Mr. Mierzwinski, I think you would have to agree, as well, that it surely doesn't hurt to have the input from small business and concerns that they express. That makes sense, doesn't it?

Mr. MIERZWINSKI. Congressman, I think that through the existing panels, the SBREFA panels and the Consumer Advisory Board which small businesses are eligible to sit on, through the Office of Financial Institutions and Business Liaison—which by the way, was set up by the CFPB—

Mr. PITTENGER. Sir, I am running out of time. What we are hearing from these small business—

Mr. MIERZWINSKI. I just—

Mr. PITTENGER. —they have not had that access.

Mr. MIERZWINSKI. —I respect the purpose of your bill, but I don't think your bill is necessary to provide the input.

Mr. PITTENGER. According to the people who are in the real world, it is.

I yield back my time.

Chairwoman CAPITO. The gentleman yields back.

Mr. Fitzpatrick?

Mr. FITZPATRICK. I thank the Chair.

Ms. Peirce, on November 4th the Mercatus Center released a commentary entitled, “CFPB Study of the Overdraft Program.” And according to the commentary, the authority found several aspects of the White Paper that raise concerns, including the following: first, general statements that are not supported by rigorous analyses; second, selective quotations that do not provide context that would accurately portray the meaning as intended by the original source; third, leading statements in the body of the White Paper that are then modified in footnotes; fourth, lack of discussion of the economic welfare overdraft protection provides to a population with few other options; and finally, no discussion of the democratization of providing overdrafts to low- to moderate-income consumers.

Who wrote that study at the Center?

Ms. PEIRCE. That was by my colleague Todd Zywicki, and he wrote it with someone else, as well.

Mr. FITZPATRICK. Do you agree with those findings?

Ms. PEIRCE. I read the study, and I think it was a good study.

Mr. FITZPATRICK. Do you believe that these flaws support the need for the Bureau to make the research that it relies upon public?

Ms. PEIRCE. I think that is just good government, that you should make the data that you use, the assumptions that you make, the uncertainties that you have, you should make those all public. You are not trying to weaken your case, you are trying to draw in as much information from the outside as you can. And that leads to better rulemaking. This is not about the Bureau specifically. This is what all agencies are supposed to do. This is just good government.

Mr. FITZPATRICK. Mr. Pincus, are you familiar with the CFPB study on the prevalence and use of payday loans and deposit advance products?

Mr. PINCUS. Yes, somewhat.

Mr. FITZPATRICK. Do you believe that the research that underlies the study should be made public?

Mr. PINCUS. Absolutely. I agree with Ms. Peirce. There is no reason not to make the underlying data public of almost any study. Obviously, you don’t want to make public confidential information or personally identifiable information and whatever is released has to be scrubbed to take care of that. But the agency depicts itself as being data-driven, and any good researcher will tell you that the best way to be sure that you are drawing the right conclusions from data is to not only put out your conclusions, but make the data available.

Mr. FITZPATRICK. So you are saying you can think of no reason not to make—there might be some even peripheral or any reason at all?

Mr. PINCUS. I think you want to protect, as I said, personally identifiable information. There may be business confidential information that obviously would have to be protected from release, as that is under FOIA and other statutes. But if this is just statistical

data that isn't being tied to anyone, that is being used to generate particular results, I think that is important.

There is a lot of concern among many of the companies I talk to that, although the Bureau references data, a lot of what it does is often driven by anecdotes or sort of one-off information. And I think not only would releasing the data allow the Bureau's conclusions to be tested, but it would rebut the argument and the concern that these are really being driven, these regulatory decisions are being driven by things other than data. And I think that would make the Bureau more credible.

Mr. FITZPATRICK. In your experience, what do other agencies do?

Mr. PINCUS. A lot of other agencies release data. I was struck by Ms. Peirce's comment generally about openness. A lot of other agencies are just much more open than the CFPB. For example, I have some experience with the FTC. And when the FTC is thinking about a problem, a policy problem, what it will do is put out a notice for comment, ask for public comments, and have a day-long symposium where different people can debate it. All of that is webcast and open to the public. And then it will follow up by using all of that information to make its decision.

And the Bureau has sort of taken the opposite conclusion. In the arbitration study, for example, that Mr. McHenry was referencing, it is true that the Bureau will meet with people, but it won't tell anybody what it is studying. It never laid out the topics of the study and said, "Please submit any information you have, please conduct other empirical studies. If you get them in by date X, we will use them. Here are the studies that we are relying on."

It is a very one-way process. You can give information, but you don't know if it is relevant at all to what the Bureau is doing, and you have no idea what the Bureau is using as its information base.

Mr. FITZPATRICK. My time has expired. Thank you.

Chairwoman CAPITO. Mr. Luetkemeyer?

Mr. LUETKEMEYER. Thank you, Madam Chairwoman.

Thank you all for being here today, too. It is extremely important. I know that we have a lot of issues here, a lot of bills that try and find ways to improve CFPB's ability to do its job. Whether you agree with it or not, I think there is no perfect bill, there is no perfect agency, and to try and improve it is not something to be discounted.

So I am kind of curious. All of you have, I assume, looked at the whole list of bills. Are there some in here that you think are fantastic or some that you think are a total waste of time? I would just be kind of curious about your feelings on them. I know we have read your statements and listened to your testimony. Give me a little heads-up. Give you one more shot, take a shot at the bill. How is that?

Mr. PINCUS. I think the Chamber's view is that all of these bills address areas that have to be addressed, that for the vast majority they deal with process issues in which the Bureau is following a path very different than other agencies, and I would just list off the IG. Every agency has an IG.

As I was just saying, many other agencies before they issue guidance will have a process for getting public comment. Many other agencies have a process for getting advisory opinions or some kind

of informal advice. Other agencies, because of the appropriations process, if for no other reason, don't have the ability to collect civil penalties and spend them on broad purposes.

For example, the SEC has a procedure for depositing civil penalties that it collects into what is called a Fair Fund and distributing that to victims of securities fraud, but it doesn't get to use that money for any other purpose.

Mr. LUETKEMEYER. Okay. I don't want to cut you off, but I would like to have Ms. Peirce get a chance here.

Ms. PEIRCE. I can't endorse specific bills, but I will say that Mr. Mierzwinski said something about how the Bureau is still young. And so I think that is the point: that the Bureau is a young agency and this is the time to fix the problems, because otherwise they develop into pathologies that are very difficult to correct. So anything you can do to kind of get them on the straight and narrow now will benefit consumers down the road.

Mr. LUETKEMEYER. Mr. Chapman?

Mr. CHAPMAN. It looks like the bill should be supported. I think the jury is out at this juncture, and we will still need some more time to answer that question specifically.

Mr. LUETKEMEYER. Okay.

Mr. Mierzwinski?

Mr. MIERZWINSKI. Congressman, if you weren't here, I opposed all the bills, as did Americans for Financial Reform. I think the most problematic is Mr. McHenry's bill. The Chamber is losing in an open, fair transparent process on whether or not arbitration should be banned or regulated by the CFPB. That is why they support taking away the CFPB's authority.

I haven't talked about a couple of the bills. Mandating advisory opinions by statute would be analysis paralysis, and subject the CFPB to numerous lawsuits. If one company's product is determined to be good and another company's is not so good, you are going to have a lot of litigation. You are going to have litigation over any statutory advisory opinion process. And defining the word "abusive," it is clarified in the statute, and there are several cases that the CFPB has brought using the abusiveness prong.

Mr. LUETKEMEYER. Okay. Mr. Mierzwinski, I have a couple of questions for you, then. I have a situation where I had a local bank, a small bank, and the director called me and said, "Hey, we just got out of the CFPB meeting, we just got fined $107,000 because the entity, the small mortgage lending company that we purchased had taken out a lease that they believed, the CFPB believed was $300 per month above what the market is and over the course of 9 months overpaid $2,700." They fined them $107,000. Do you think that is abusive?

Mr. MIERZWINSKI. I don't know about that case, Congressman.

Mr. LUETKEMEYER. That is a true story, by the way.

Mr. MIERZWINSKI. $300 and $1,700, I don't know about that case.

Mr. LUETKEMEYER. My question is, do you think that is abusive by the CFPB?

Mr. MIERZWINSKI. I would have to look at the case.

Mr. LUETKEMEYER. $300 above market. Their reasoning for fining the bank was it is going to have to raise the cost of doing

business on the rest of the clients, $2,700, make up the $2,700. Is that a rationale you can support?

Mr. MIERZWINSKI. I would have to look at the case.

Mr. LUETKEMEYER. Thank you.

Another situation we are aware of is I had a group of bankers who went to the CFPB to talk to them about the QM rule. They were told by the CFPB folks that they were the 42nd group who had come there to talk about this, and yet they continued down this path to issue a rule that everybody in the whole industry told them will not work and is going to be abusive.

I think it is time that they were reined in. I understand that they are new, but that is a good time also to make some changes to make sure they stay on the right path.

With that, I yield back. Thank you, Madam Chairwoman.

Chairwoman CAPITO. Thank you.

Mrs. Maloney for 5 minutes.

Mrs. MALONEY. I want to thank all the panelists, and the chairwoman and ranking member for calling this important hearing. I was ranking with Mrs. Capito in other Congresses and it is an incredibly important committee.

I agreed very much with Mr. Pincus' opening statement that industry should support consumers because that helps industry, and if consumers don't trust industry, then the investment in our products doesn't happen. And I would venture to say that every member of industry would accept the Dodd-Frank reforms if they had known before and known that could have prevented what we lived through.

We lost roughly $18 trillion of wealth in this country. I remember one weekend I went to bed, and by the time I woke up, there were about 10 companies that went under in the district that I have the privilege of representing. The amount of human suffering and corporate loss was unprecedented.

And what is so staggering to me about that crisis is that it could have been prevented. Testimony after testimony before the Joint Economic Committee has been that it was the only financial crisis in our history that could have been prevented if we had regulated products better, mainly the subprime crisis that hurt so many homeowners and hurt so many people and hurt the financial industry of our country.

So the Consumer Financial Protection Bureau, a lot of people have the responsibility to speak up for consumers as many on the panel pointed out, but oftentimes they don't do it because they have other responsibilities, such as safety and soundness or the bottom line or whatever. They have other responsibilities that come before the consumer.

So, I support the CFPB. I think it is good for the country and good for business to have an agency that focuses on protecting consumers, because when we are protecting consumers we are basically protecting businesses in our country. And when you take all of these items that are before us and you put them together, in my opinion, it is death by 1,000 cuts to the CFPB. And by all accounts, industry in my district has been complimentary to the CFPB in their openness to listen and their responsiveness to it.

Now, there is one that if I were industry, I would be objecting to. And that is the one calling upon the CFPB to issue a thoughtful and workable rule defining the term "abusive" in just 15 days, as one of these bills would require. And it appears to me that forcing the Bureau to rush to such an important definition, the definition of abusive financial practices, would open the final rule to litigation by industry, because if I didn't like the rule, boy, I would be suing that it is capricious and not thoughtful to come forward with a rule within 15 days that would have a serious impact on my bottom line as an industry.

So I just would start on this end and go down the line on whether you think 15 days to come out with such an important rule—does that make any common sense to you whatsoever?

Mr. MIERZWINSKI. I think, Congresswoman, that bill is very poorly drafted in that regard. And it also—I raised the question that if the CFPB did that proposed rule, then held the notice and comment, then issued a final rule, does the bill allow it, if new abusive practices that aren't defined by the rule occur later, does it allow them to have a second rulemaking? I don't think it does.

Mrs. MALONEY. But anyone else, do you think 15 days—let's just go down the row, Mr. Chapman, Ms. Peirce, and then Mr. Pincus, is 15 days enough time to come back with a rule on abusive practices? It is a term that is used by the Fed all the time. But is 15 days enough time? I would be objecting if I were a member of industry. I am just curious as to your response.

Mr. Chapman?

Mr. CHAPMAN. Specific to that, I am sorry, I can't give you a factual comment. But I can say I think that the CFPB is doing a wonderful job. It just needs to look at some different transparency and different communications to those that it regulates. So by the nature of creating the Small Business Advisory Committee—

Mrs. MALONEY. Actually, I support that. What is wrong with that? Everybody should have an advisory committee. Who cares, you know? There are other advisory committees all over the place. So I think that is a good recommendation, quite frankly.

Mr. CHAPMAN. Thank you.

Mrs. MALONEY. But to write a rule, a major rule in 15 days, I think is unreasonable.

Ms. Peirce?

Ms. PEIRCE. They are already using the term in their enforcement actions, so they already know what it means, and it shouldn't be hard for them to write a rule.

Mr. PINCUS. I think the particular timeline may be too short, but I think that the bill gets at a problem, which is, again, going back to the legitimate businesses that want to do the right thing, they don't know how—

Mrs. MALONEY. But Mr. Pincus, you are very knowledgeable. This is a term that has been used by all the regulators. Every rule I see coming out of the Fed uses "abusive practices," so why have they not been called upon to define it?

Mr. PINCUS. It has not been a term previously used in the consumer protection area, and I think that is the concern. And the greater concern is that what the Bureau has done, rather than create a process to at least get some input on what the consequences

might be of different interpretations, is it has used enforcement actions where it also has made claims under its "unfairness and deceptive" authority to put out very, very broad definitions of "abusive." The cases are settled. They are never challenged. And companies don't know what to do because what the—

Mrs. MALONEY. The cases can be challenged.

Chairwoman CAPITO. The gentlewoman's time has expired.

Mr. Barr?

Mrs. MALONEY. They can be challenged and rules put out by the Fed have used the term "abusive."

Mr. BARR. Thank you, Madam Chairwoman.

Since we are on the topic of the proposed legislation that I have offered relating to defining abusive practices, whether it is 15 days or 30 days or 60 days to develop the rule, it is important to note that there is a notice-and-comment period that would give regulated parties and other interested parties the opportunity to weigh in on the proposal, a very deliberative process. The problem is that the CFPB is not going through that process. There is no timetable now.

And so the issue is, if we want some timetable, some deliberative process to give notice to regulated parties, what the rules actually are, let's give them at least 15 days, maybe more, and then give them more time to have a notice-and-comment rulemaking process. I think it goes to the good testimony of Mr. Pincus and Ms. Peirce that the regulated parties here don't know what the rules of the road are.

And so to that point, let me go beyond the argument Ms. Peirce makes about, this is just good government and that we want to eliminate legal uncertainty. Is there legal authority for the CFPB to simply ignore the Administrative Procedure Act and just engage in ad hoc, after-the-fact rulemaking? It is almost as if you say there is a reasonable speed limit, we are not going to tell you what it is, but here are the keys, go out on the road, and the police officer who pulls you over is going to decide there on the spot whether or not you get a ticket.

Is that a proper analogy here, Ms. Peirce?

Ms. PEIRCE. I think it is. In fact, that is what Director Cordray has said. He said, "Well, you will know it when I see it and when I tell you I have seen it. And that is just not an acceptable way for a regulator to work, and that, to your point, is the reason that we have the Administrative Procedure Act. It is so that we have rulemaking done in a very careful way with input and then people will know which standards they are subject to.

Mr. BARR. Mr. Pincus, in defining the boundaries of what the abusive standard actually should be, obviously the draft legislation has a 60-day notice and comment period. Does providing that period give the public sufficient opportunity to provide input so that the rule and the definition of abusive can be the right standard?

Mr. PINCUS. Yes, I think it does.

Mr. BARR. And what would be the consequences of lack of public input?

Mr. PINCUS. What happens when there is no public input is that regulatory standards get devised without the agency knowing what the consequence is and also get sort of elaborated on in a way that

companies that absolutely want to be law abiding don't know what the rules are, can't build compliance systems that screen out what has been determined to be bad behavior.

And the other problem that we have here is that the Bureau seems to be going down a path of defining "abusive" in just the way Congress said—to do just what Congress said the Bureau couldn't do, which is to impose suitability requirements for financial services and products. Because what it said in these few settlements where it is mentioned abusive is that what was abusive, it appears to be, it is very oblique, but what it appears to be is that the company could have known if it had put a bunch of information together that this product wasn't right for this consumer, and because the product was offered to these consumers, that was abusive. And that obviously goes directly contrary to Congress' intent in removing suitability authority when Dodd-Frank was being legislated.

Mr. BARR. And does after-the-fact enforcement and ad hoc enforcement without a clear rulemaking that gives advance notice to regulated entities also increase the likelihood of inconsistent enforcement?

Mr. PINCUS. It increases the likelihood of inconsistent enforcement, and what it does is chill companies from entering the market. If you don't know what the rules of the road are, the only safe thing to do is don't do anything new or different, don't try and serve a market that is underserved, because you may get into trouble.

Mr. BARR. Yes. And, Mr. Mierzwinski, Director Cordray said that we expect a marketplace where companies are honest and clear so that consumers know the key terms and conditions of financial products up front. Shouldn't that same philosophy apply to the regulator, that the regulator should be honest and clear and provide what the rules are up front so that the American people know what the rules are before they are asked to comply with the rules?

Mr. MIERZWINSKI. Congressman, I would simply say that if the companies that had lost the abusiveness cases thought they had a case, their learned counsel would be down at the D.C. Circuit Court appealing those decisions.

Mr. BARR. One final question. You had mentioned in your testimony, sir, that this is a start-up agency going through growing pains. Should the CFPB apply a more relaxed scrutiny to start-up banks or financial institutions or lenders that are experiencing growing pains?

Mr. MIERZWINSKI. I think it does. I think it does already. I think it is a very flexible agency, sometimes much more flexible than people on the Hill really know. And you should go down there. They will have you in for a visit.

Mr. BARR. Thank you. I yield back.

Chairwoman CAPITO. The gentleman's time has expired.

Mr. Green?

Mr. GREEN. Thank you, Madam Chairwoman.

I thank the witnesses for appearing. I am intrigued by the style of the hearing which deals with transparency and accountability, and I think it is appropriate to have transparency and accountability. But I am intrigued because H.R. 4662—and I am pleased

that the sponsor is present—would have a statement issued that is confidential. It deals with the advisory opinions.

And I am willing to yield to my friend to have him give me—Mr. Duffy, if you would. Mr. Duffy?

Chairwoman CAPITO. Mr. Duffy?

Mr. GREEN. I'm sorry. I didn't mean to interrupt you. I just wanted to ask you about your bill. Might you and I have a polite exchange?

Mr. DUFFY. Oh, absolutely.

Mr. GREEN. Because I do commend you and compliment you on a good many of your accomplishments, especially seven children.

Mr. DUFFY. Thank you.

Mr. MULVANEY. That is actually what we were talking about.

Mr. GREEN. All girls?

Mr. DUFFY. Five girls, two boys. He wanted to know if I know what caused that, and I said Catholicism.

Mr. GREEN. Okay. But I am very serious and this is with the best of intentions that I ask: Why would we have a confidential opinion given as opposed to an opinion that all could benefit from, given that we are seeking transparency? And honestly, my question is with the best of intentions. And I would ask you to give me your response.

Mr. DUFFY. Are you talking about my bill—

Mr. GREEN. I think it is—H.R. 4662 is yours, isn't it?

Mr. DUFFY. The consumer advisory bill?

Mr. GREEN. Right. Yes, sir.

Mr. DUFFY. And I'm sorry, your question again is?

Mr. GREEN. My question has to do with the confidentiality associated with the opinion that is requested, and I am asking why would it be confidential? We are talking about transparency. Why would you want an opinion that others can't benefit from?

Mr. DUFFY. I don't know that I have a confidentiality portion of my bill.

Mr. GREEN. Unless I have a bad copy, I am assuming this is H.R. 4662.

Mr. DUFFY. I am going to move down here, as we talk, to my materials.

Mr. GREEN. Okay. Great. It is titled, "the Bureau Advisory Opinion Act." Is that yours?

Mr. DUFFY. That is Mr. Posey's bill.

Mr. GREEN. Mr. Posey's.

Mr. DUFFY. You were confusing me there for a moment.

Mr. GREEN. All right. Sorry about that. He is not the guy with the kids. Okay. He is not here.

I didn't want to bring this up without the person who actually is the sponsor being here. And the bill does deal with confidentiality.

So with that said, let me just ask the panel, why would we have a confidential opinion? And I am asking with the best of intentions. Why would we want to have opinions issued that are not available for others to benefit from given that we are placing transparency on a pedestal? Why would we do this?

Mr. MIERZWINSKI. If you are starting at the left end, I would say, Congressman, I don't know why we would do that bill because I

think that it puts the Bureau into very complicated, murky legal terrain. There would be challenges.

And the other thing about it is that it is a tremendous resource drain. The Bureau has to write rules, the Bureau has to conduct enforcement, it has to study markets, it has to provide information to consumers, and now it has to deal with every single request from any company for an advisory opinion that is private. It doesn't make sense to me.

Mr. GREEN. Would someone else like to respond?

Mr. CHAPMAN. I think the opinion should be open and available to the public, redacted where appropriate.

Mr. GREEN. Yes.

Mr. PINCUS. I think the practice of many agencies is that they are open. I think the question is, if a company has a business confidential, a new idea that it doesn't want to share with the rest of the world but wants to get some advice, is there a way to redact the confidential information, which other agencies do, so that the advice is there but the idea remains—the company that is seeking to do the right thing keeps the ability to capitalize on its idea?

Mr. GREEN. Have you read this bill?

Mr. PINCUS. I have.

Mr. GREEN. You have? Do you believe that is what is accomplished with this bill?

Mr. PINCUS. I am not sure that this language does exactly that. I think there probably is a way to provide for opinions to be published or to be put up on the Web site, which is what people do now, but to provide that business confidential information as it is in other circumstances is redacted so that is protected.

Mr. GREEN. Thank you, Madam Chairwoman.

Chairwoman CAPITO. Thank you.

I now recognize Mr. Westmoreland.

Mr. WESTMORELAND. Thank you, Madam Chairwoman.

Mr. Mierzwinski, I want to follow up on an answer that you gave Mr. Duffy earlier. I'm sorry, I was not here. But you said that the CFPB should collect information about religion because the CFPB is monitoring markets and not individuals. Was that your statement?

Mr. MIERZWINSKI. Generally, yes.

Mr. WESTMORELAND. Okay.

Mr. MIERZWINSKI. Could they collect the information, but I said it is not important to study the consumer. They want to study markets. And in follow-up, I said to the Congressman—he asked me why, and I said, well, I think there are a lot of companies that target people of different faiths and it might be something you want to study because of that.

Mr. WESTMORELAND. Okay. Then, why would they need to collect Social Security numbers or GPS locations of somebody's house if they were just doing market research?

Mr. MIERZWINSKI. Market research today involves trying to figure out what companies are doing with information. What this has to do with is—

Mr. WESTMORELAND. I know, but what would that have to do with an individual?

Mr. MIERZWINSKI. I'm sorry, they are trying to find out whether or not you, at your location, are being treated differently than me, at my location, all other things being equal, and how companies are marketing to people in three dimensions.

Mr. WESTMORELAND. With a GPS system, not just a ZIP code? Don't most people do it by ZIP code?

Mr. MIERZWINSKI. Most companies, Congressman, are now tracking you on your mobile phone. They want to know where you are at any time of the day.

Mr. WESTMORELAND. So you think that is appropriate, for the CFPB to track you on your mobile phone?

Mr. MIERZWINSKI. The CFPB, I understand, is collecting data sets that include it. I don't think they are tracking people in the way that the companies are tracking people. I think that if they are collecting, and I would have to look at this FHFA study, if they are collecting data, they are collecting data on what the companies are doing with GPS data. They are not tracking you.

Mr. WESTMORELAND. Okay. You also, I think, said that consumers trust the CFPB?

Mr. MIERZWINSKI. Oh, I think the consumers do.

Mr. WESTMORELAND. Now, have you done a poll on that or what have you done to prove that? Just talk to people in your neighborhood?

Mr. MIERZWINSKI. Congressman, Americans for Financial Reform has conducted surveys, legitimate statistical studies; Celinda Lake's organization, Lake Research, has done them for us. I would be happy to enter them into the record. But I don't know if we have a question, do we trust the CFPB's use of privacy? But we absolutely have questions, do you trust the CFPB and do you see a need for an agency that has only one job, protecting consumers? Absolutely.

Mr. WESTMORELAND. It is interesting that their one job is to protect consumers, yet they have more information than the NSA does or any other agency in the government on these consumers, and the people who have as a repository for this information do not have a security clearance other than just a background check.

So do you think that gives the consumer any type of sense of protection, and do they understand when they answer one of these surveys that somebody sends out that they have all this information and that the people who hold it do not have any type of security clearance?

Mr. MIERZWINSKI. I am unaware, and I would be interested in the committee's background memos, because I don't have them, and I was asked to testify just a few days ago. I haven't found out whether any agency that collects personally identifiable information (PII) requires a security clearance of all the employees who have a chance to look at it. But I don't think that the American public is concerned right now. The CFPB is responsive to OMB's requirements on protection of data and they are doing it.

Mr. WESTMORELAND. I don't think there is a lot of faith in the IRS that they are keeping that data confidential either. And it is just amazing to me that this start-up agency has the access to all of somebody's personal information. I just think that is of great concern to the American people that these folks have nothing but

a background check, no security clearance, no confidential clearance, nothing else, but yet to be a Consumer Financial Protection Board one breach, one thing from them, it could be—and identity theft is the worst crime that we can have for somebody's credit right now.

So with that, ma'am, I know my time is up, and I yield back.

Chairwoman CAPITO. Mr. Scott?

Mr. SCOTT. Thank you. I just got back from voting.

I have a couple of questions. Ms. Peirce, I think it was you who said that you didn't think there was any need for the CFPB. Is that correct?

Ms. PEIRCE. It is correct that I said that. My thinking is that the functions that the Bureau performs could be performed by existing agencies.

Mr. SCOTT. What existing agencies?

Ms. PEIRCE. The banking regulators could have performed the functions that were given to the Bureau. And there are good arguments—

Mr. SCOTT. You are very much aware that the banking regulators could not provide the function to prevent the Wall Street crash?

Ms. PEIRCE. I agree with you that they did not do a good job, and so giving regulators more authority is not the answer that I would have written.

Mr. SCOTT. That is very revealing what you said. The CFPB, without question, is needed, there is no question about that, to protect consumers. Adjustments, perhaps, in certain cases, yes. There is no law that is perfect. There is no approach that is perfect. But it just struck me as rather odd that you were the only one who said that and would refer to agencies when those agencies didn't do the job, the main job, that caused the need for the CFPB in the first place.

Ms. PEIRCE. I think that we are all here today to see that the Bureau that does have those authorities is doing the job right, and I think that is why additional protections are needed on how they do that.

Mr. SCOTT. Yes, I agree with you, and I agree with you 100 percent on that statement. What I don't agree with you on is that we didn't need it. But I am glad to hear you say that what you want to do is make it work and make it apply. But let there be no question, we need this. And I work with the CFPB. There are areas there that I am working with them on where we can fashion and we make the industry.

There is no law we have on the books, there is no policy we have on the books that is foolproof. We are still working with things like Medicare, Social Security, whatever it is, you are constantly working with. But, again, I am glad I clarified that, and I certainly welcome your work with us to fix the ailments that may come up with the CFPB.

I wanted to talk about something that hadn't been talked about, though, and that is Mr. Stivers' bill on inspector general reform. Now, that gives me some problems, too.

And, Mr. Mierzwinski—I hope I didn't murder your name, but Mierzwinski, I think, all right—what is going on here? It seems to

me the IG that we have in place is basically working. Why do you think we need a new one? Do you agree with this, that we need a new IG in there?

Mr. MIERZWINSKI. I am always surprised when the majority party asks to make government bigger. It does surprise me. And I would point out in my testimony I have a letter, excerpts from a letter that the Inspector General for the Fed and the CFPB sent to the Bipartisan Policy Center, the group that organized and supported in their report this notion of an independent IG, and the Inspector General found mistakes in that BPC report, and he asked for them to be retracted. And he also said we absolutely have all the authorities, all the power, and all the resources we need to continue to do this job. So, again, I don't see the need for the legislation.

Mr. SCOTT. Do you or any of you on the committee, is there any evidence that even would suggest that the current IG has failed to conduct rigorous and adequate oversight of the CFPB? So no evidence, nothing—

Ms. PEIRCE. I would argue that there certainly is more work that they could have done. And I think the other half of that problem is that the Federal Reserve got a lot of new powers under Dodd-Frank, and I think the Federal Reserve is woefully underinspected by their Inspector General. So I think that there is work to be done on both agencies that is not getting done.

Mr. SCOTT. All right. But you don't have any specific examples or evidence where—

Mr. STIVERS. Would the gentleman yield?

Mr. SCOTT. Sure.

Mr. STIVERS. I don't know if you are aware, and it is in the committee's report, but in the 15 reports that the Fed's IG was supposed to do on the CFPB, there were 35 delays. And if you find that acceptable, then maybe you are okay with the current situation, but I don't find that acceptable.

Mr. SCOTT. I also think if you would look at several other IGs in several other agencies, the Veterans Affairs IG comes to mind, you can come up with some examples of that. But I am talking about rigorous enforcement, a need to overhaul and replace them with a totally new IG, correct that malfunction, and move on. I don't see where there is a need for the entire new IG.

But anyway, Madam Chairwoman, thank you.

Mr. STIVERS. Would the gentleman yield again?

Chairwoman CAPITO. The gentleman's time has expired.

Mr. SCOTT. Yes, I already yielded.

Mr. STIVERS. I will make my points during my time, then.

Chairwoman CAPITO. Mr. Mulvaney?

Mr. MULVANEY. Thank you, Madam Chairwoman. Thank you to both you and the ranking member for letting me participate in this subcommittee today.

Mr. Pincus, when you started off, one of the very first things you said was that one of the difficulties that many of the companies that are regulated by the CFPB are facing is that they just don't know what the rules are. They want to abide by the rules, but they just don't know what the rules are because either they don't exist or they are not clearly defined.

Mr. Mierzwinski, you did not get a chance to comment on my proposed legislation in the long list of ones that you talked about at the beginning, but let's talk about that now if we get a chance. Because I understand that one of the complaints I hear is that it takes too long to get these rules put in place. The examinations take too long. It takes too long to get the final reports. I think that the CFPB actually has internal goals on its own, they are not statutory, for 65 days for supervisory letters, 110 days for depository institutions' final reports.

So one of the things my proposed bill does, the Bureau Examination Fairness Act, is to codify those deadlines and to give the CFPB 60 days to do the initial investigation, and 120 days to actually come up with the final decision, which could be extended to 180 days one time.

What is wrong with that, Mr. Mierzwinski?

Mr. MIERZWINSKI. Congressman, first of all, on your bill, I think that the Bureau has already accepted the basic premise of your bill. They are no longer doing ride-alongs for the enforcement staff in the examination process. So, examiners are not being accompanied by enforcement staff.

But I think it should be made clear in your bill that if an examiner finds evidence of continuing mistakes or problems at a company, they ought to be able to call an expert enforcement official to discuss it with them, and it is unclear from your bill whether you can do that.

But getting to the part you are talking about, I think Congress imposing deadlines like that on examiners and with so many of the terms undefined for the coordinated examinations and the overlapping examinations and that limit of $50,000—by the way, I think that would benefit the bigger banks at the expense of the smaller banks—

Mr. MULVANEY. Let's stay on the number of days first, because you have touched on a couple of things, and I want to try and touch on all of them in 2 minutes and 40 seconds. But let's stay on just the number of days. If 60 and 120 days aren't the right numbers, what are?

Mr. MIERZWINSKI. Again, I don't know that the other bank regulators—some bank regulators have permanent examiners at banks.

Mr. MULVANEY. That is not my question. What is the number?

Mr. MIERZWINSKI. When there is a permanent examiner at a bank, what is the number they are using? I don't know.

Mr. MULVANEY. Are 60 and 120 days the right number, Mr. Pincus? Ms. Peirce? Anybody? Do you have any thoughts on this?

Mr. PINCUS. I think it is the number the Bureau itself came up with, so that sort of indicates that it is the right number. And I think, talking to a lot of companies, this is a huge difference between Bureau examinations and examinations by the safety and soundness regulators, is that the Bureau examinations never end. Even if safety and soundness regulators are on the premises, the examinations have a time period, there are lots of different ones, and you get a closing letter at the end that tells you how you did or what you have to fix.

And the frustration for many, many, many banks and other institutions that are being examined is they never get the end. It is just

everything is held open forever. There is no closure. Again, people don't know what the rules of the road are so that they can implement what other changes they have to implement. And meanwhile, some other examination on another topic has started and is overlapping and that is a huge consumption of resources.

Mr. MULVANEY. Let's come back to the enforcement agents, the ride-alongs, because you are exactly right, Mr. Mierzwinski, you mentioned that the CFPB has stopped doing that. What is wrong, then, with codifying that? Again, all I think I am doing with my 60 and 120 days is codifying what the Bureau says is its best practice? And I would like to codify that for the enforcement agency, as well. Do you have a difficulty with that?

Mr. MIERZWINSKI. Again, as I said, I am not sure that applies to other agencies as well, does it? Do the other agencies have a prohibition on ride-alongs in statute?

Mr. MULVANEY. Some of them do, yes.

Mr. MIERZWINSKI. Then, again, the question is could an enforcement agency take a phone call from an examiner under your bill?

Mr. MULVANEY. I don't know the answer to that question. But generally speaking, do you have difficulty with codifying these rules? Do you think that an agency should operate under defined rules from Congress, or do you think they should be able to make up their own rules on how they want to function?

Mr. MIERZWINSKI. I have always felt that agencies are expert and Congress should provide overriding general statutes, but putting numbers into statutes is always problematic.

Mr. MULVANEY. And I guess doing what you have just suggested then would be overly problematic because the oversight ability we have is extraordinarily limited. If they get to make up their own rules on how long they want to take—or not make up any rules—I don't know what oversight is available to us.

I had some other questions about the 50,000, but I am out of time. So I appreciate the opportunity.

Chairwoman CAPITO. Thank you.

Mr. Stivers?

Mr. STIVERS. Thank you, Madam Chairwoman. I really appreciate the chance to have this hearing, and I appreciate the witnesses being here today.

I want to talk a little bit about the bill that the gentleman from Georgia brought up earlier, my bill, that is a bipartisan bill to create an independent Inspector General for the CFPB.

As everybody in the room knows, the CFPB has no budget that is approved by Congress. They are not a board. It is one individual who runs the organization, and they draw down their money from the Federal Reserve. And unlike the 50 other agencies that have independent Inspectors General—and when I say independent, I mean appointed by the President, confirmed by the Senate—the CFPB has an Inspector General who is appointed by the head of the Federal Reserve, but not confirmed by the Senate. It does not make sense.

And so, I think they should be on the same plane as the SEC, the CFTC, the FHFA, the FDIC, and the Treasury. That is all we are asking for here. This is a bipartisan bill. It is a bipartisan solution. And one of the witnesses suggested that they don't like it

when Republicans want to grow government. I just want to make government work better. There is nothing wrong with having transparency and accountability for everybody.

Does anybody on the panel know of any reason why the CFPB should be created or treated any differently than the other 50 agencies that have an Inspector General who is appointed by the President of the United States and confirmed by the United States Senate?

I will take that as a no.

So is there anybody on the panel who believes that transparency is a bad thing, accountability is a bad thing?

Is there anybody on the panel who believes that transparency is a good thing?

Mr. PINCUS. Yes.

Mr. STIVERS. I will note that every witness is shaking their head that transparency is a good thing.

Now I will, Mr. Mierzwinski—is that how you pronounce your name, sir?

Mr. MIERZWINSKI. Very good.

Mr. STIVERS. Is that correct?

Mr. MIERZWINSKI. Correct.

Mr. STIVERS. You had a dialogue earlier with the gentleman from Georgia to which I interjected that the CFPB—the Fed Inspector General has had 15 reports relating to the CFPB, and they have had 35 delays on just 15 reports. Do you find that acceptable?

Mr. MIERZWINSKI. I don't find that necessarily acceptable, but I would have to compare it to other IGs.

Mr. STIVERS. So you don't want to compare it against any sort of regular standard that when they make their work plan they report their work plan to our oversight committee every quarter. You don't think it should be that they get to make their own work and plan their work and they should generally meet the deadlines they set. Nobody set these deadlines for them; they missed their own deadline 35 times on 15 reports.

So you could compare that and say, well, everybody else is really bad so it is okay for them to be really bad. But I think for accountability and transparency and for the taxpayers, we want them to meet their own deadlines. And you may or may not know that they have over twice as many people, the Fed Inspector General oversees double the number of employees as overseen at the Federal Trade Commission, the Consumer Product Safety Commission, the NCUA, or the CFTC. The problem is they oversee a lot of folks, and that is a problem.

I guess the other question I would have for Ms. Peirce is, so the Fed Inspector General serves the Federal Reserve Board and the Consumer Financial Protection Bureau. Do the missions of these two agencies differ?

Ms. PEIRCE. They differ significantly.

Mr. STIVERS. Can you serve two masters in two missions easily?

Mr. PEIRCE. That is my big concern, is the Inspector General should get to know the agency for which he or she is Inspector General. And having to know both the Fed and the CFPB is a very difficult task.

Mr. STIVERS. And, Mr. Pincus—is that how you pronounce it?

Mr. PINCUS. Yes.

Mr. STIVERS. Mr. Pincus, the CFPB is a start-up agency. It now has over 1,300 employees. In your experience, when is the time that you can make the most mistakes in an agency, is it when you are a mature agency or when you are a start-up agency?

Mr. PINCUS. I think mistakes are possible all the time. But certainly when you are a start-up, the growing pains can often lead to problems. And it is also the time when bad practices can get institutionalized or—rooted out right at the beginning, which is obviously preferable.

Mr. STIVERS. If the CFPB were to have their own Inspector General, Mr. Pincus, don't you believe that they could root out those potential institutional policies? For example, the CFPB just, I believe—I don't know if it is public—had an issue with discrimination. And they are only 2½ years old. And they paid out millions of dollars related to that. Does that sound like it could have been something that could have been prevented if they had their own Inspector General?

Mr. PINCUS. Absolutely. The Inspector General would have been looking at what was going on and giving independent advice.

One of the problems for the CFPB, as Ms. Peirce mentioned earlier, is unlike all the other agencies you mentioned that have multimember commissions, it is just one Director. So the opportunity to have input from others who might have a different perspective just isn't there. And an IG would supply that.

Chairwoman CAPITO. The gentleman's time has expired.

Mr. STIVERS. Thank you, Madam Chairwoman.

Chairwoman CAPITO. In conclusion, I would like to thank all of you. Thank you for your patience. I know we were a little in and out here. But I think we got a lot of good information, and I appreciate everybody's opinion.

The Chair notes that some Members may have additional questions for this panel, which they may wish to submit in writing. Without objection, the hearing record will remain open for 5 legislative days for Members to submit written questions to these witnesses and to place their responses in the record. Also, without objection, Members will have 5 legislative days to submit extraneous materials to the Chair for inclusion in the record.

Without objection, this hearing is adjourned.

[Whereupon, at 4:05 p.m., the hearing was adjourned.]

A P P E N D I X

May 21, 2014

Legislative Proposals to Improve Transparency and Accountability at the CFPB

House Financial Services Committee

Subcommittee on Financial Institutions and Consumer Credit

Wednesday, May 21, 2014
2:00 p.m.

Testimony of Rob Chapman, President

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Chairman Capito, Ranking Member Meeks and members of the subcommittee, my name is Rob Chapman, and I am the President of the American Land Title Association. I am Executive Vice President and Chief Information Officer for Old Republic National Title Insurance Company, which provides title insurance policies and related real estate products and services for individuals, businesses, and government for more than a century. I joined the company eighteen years ago.

ALTA, founded in 1907, is the national trade association and voice of the real estate settlement services, abstract and title insurance industry. ALTA's nearly 5,000 member companies operate in every county in the United States to search, review and insure land titles to protect home buyers and mortgage lenders who invest in real estate. ALTA members include title insurance companies, title agents, independent abstracters, title searchers, and real estate attorneys, ranging from small, one-county operations to large, national title insurers.

On behalf of ALTA, I appreciate the opportunity to appear before you today to discuss our members' experiences with the Consumer Financial Protection Bureau and offer bipartisan ideas to improve how the Bureau regulates providers of financial services. ALTA members are predominantly small businesses. We believe that many of the bipartisan ideas before the committee today have the potential to help improve the way that the Bureau protects consumers and works with businesses. There is no doubt that the CFPB has increased the complexity of regulatory oversight. This complexity begs for Congress to work in a bipartisan way to improve the way the Bureau operates. Before I offer our perspective on important suggestions to help businesses, large and small, as well as the consumers they serve, let me share our experience with the CFPB to this point.

CFPB oversight of real estate settlement services

ALTA members provide two primary services to consumers and financial institutions. First, the industry prepares and writes title insurance policies protecting both purchasers and mortgagees of real property. This service falls outside the Bureau's regulatory and supervisory authority as part of the business of insurance. Second, title professionals act as third-party settlement agents in real estate and mortgage transactions. This service is within the Bureau's authority pursuant to the Real Estate Settlement Procedures Act.

We have worked with the Bureau as it crafted new regulations and initiatives that impact the real estate settlement industry. Based on our experience, we have drawn many of the same conclusions as the September 2013 report issued by the Bipartisan Policy Center entitled, "The Consumer Financial Protection Bureau: Measuring the

Progress of a New Agency."[1] The BPC's Financial Regulatory Reform Initiative's Consumer Protection Task Force report found:

> Perhaps the most significant trend the Task Force discovered was that when the Bureau operated in a transparent, open, and iterative manner, repeatedly seeking input from all stakeholders throughout a process, the results were generally positive. However, when the Bureau made unilateral decisions, rolled out initiatives, rules, or processes as a result of a more closed, internal deliberation process, the results were far more likely to be problematic.

We have a good working relationship with the Bureau on a variety of issues, and ALTA members have experienced a positive interaction with the Bureau on matters that went through an iterative policy development process. However, we also feel the consequences of policy decisions that are the result of a closed process.

Third-party service provider bulletin

While ALTA members are not directly supervised by the Bureau, we are indirectly regulated through the Bureau's oversight of both depository and nonbank mortgage lenders. Our industry is most acutely feeling the impact of CFPB Bulletin 2012-03 on service providers.[2] The bulletin reminded supervised banks and nonbanks that they are expected to oversee their business relationships with service providers in a manner that ensures compliance with Federal consumer financial law. Although the CFPB bulletin restated longstanding guidance from other federal regulators, the bulletin shook up the industry and as it reminded banks and nonbanks that the Bureau will hold them liable for the actions of their vendors. Some believed that this bulletin was issued in advance of potential supervisory and enforcement actions. In fact, later that year the bulletin was used to support enforcement action against credit card companies for actions of their third party vendors.

Unlike similar longstanding guidance from prudential regulators, including the Office of the Comptroller of the Currency (OCC) in 2001, the Federal Deposit Insurance Corporation (FDIC) in 2006, Mortgage Servicing Settlement and accompanying consent judgments in 2012 as well as subsequent guidance from the OCC and Federal Reserve Board in 2013, the Bureau's bulletin provided little guidance to banks and nonbanks. The CFPB bulletin was two and a half pages long, compared to subsequent sixteen

[1] http://bipartisanpolicy.org/sites/default/files/BPC%20Consumer%20Financial%20Protection%20Bureau%20Report.pdf

[2] http://files.consumerfinance.gov/f/201204_cfpb_bulletin_service-providers.pdf

pages of guidance from the OCC and fourteen pages of guidance from the Federal Reserve Board in December 2013. This lack of guidance provides businesses with many open, unanswered questions about how to demonstrate compliance. This degree of uncertainty has driven disruptive, inconsistent, costly and inefficient changes in the business relationships and operations between mortgage lenders and ALTA members. We fear that this uncertainty will result in the unintended consequence of small businesses being pushed out of the market because they are not able to keep up with their larger competitors.

To help our members (both large and small) meet market demands and demonstrate that they have the appropriate skills and knowledge to manage the risk of a real estate transaction and protect consumers, ALTA created a best practices framework for title and settlement companies. In many cases this is as simple as formally adopting written procedures and controls that title companies already have in place. These practices include:

1. Establish and Maintain Current License(s) as Required
2. Written Procedures and Controls for Escrow Trust Accounts
3. Written Privacy and Information Security Program to Protect Non-Public Personal Information
4. Adopt Written Policies Ensuring Compliance with Federal and State Consumer Financial Laws
5. Adopt Written Procedures Related to Policy Production, Delivery, Reporting and Premium Remittance
6. Maintain Appropriate Professional Liability Insurance and Fidelity Coverage
7. Adopt and Maintain Written Procedures for Resolving Consumer Complaints

These are reasonable, prudent business practices that consumers should expect from their settlement services provider. We are pleased that they have been strongly supported in the market, including Wells Fargo's endorsement, which stated:

> Wells Fargo supports ALTA's Best Practices, and considers them to be guidelines for sound business practices that should ideally already be in place for businesses providing title and closing services for our customers.

Unfortunately, because they are unclear of what is expected of them, mortgage originators have widely varied practices, policies and procedures in their vendor risk management. Also, there is additional uncertainty about the CFPB bulletin's application to our industry because consumers primarily chose the provider of real estate settlement services, unlike a traditional bank vendor. The result is that businesses are shooting in the dark as they attempt to invest in systems and processes to protect

consumers. Many of our members see different requirements, vetting procedures and are concerned that they will no longer be allowed to compete for business when a mortgage is financed by certain lenders.

A better outcome for providers and for consumers would have been a process where the CFPB consulted with the relevant parties to provide more guidance on the types of practices and procedures that the Bureau expects from real estate settlement providers. Had the Bureau consulted with mortgage originators and the real estate settlement industry, we would all have a better understanding of what is expected from the person conducting the settlement of real estate transactions, and the response to the CFPB bulletin would be less disruptive, more consistent and efficient. We are eager to work with the Bureau to make this policy work.

Integrated Mortgage Disclosures

If the Bureau's third-party service provider bulletin is an example of how a more open and transparent process would benefit everyone, the rulemaking for integrated mortgage disclosures under Section 1032 of the Dodd-Frank Act is a good example of how a more open and transparent process worked well. These disclosures and accompanying regulation were published in November 2013 and will be implemented on August 1, 2015, and will replace existing disclosures under the Truth in Lending Act (TILA) and the Real Estate Settlement Procedures Act (RESPA). We are grateful for the strong working relationships that were established on this rulemaking even before the Bureau formally opened in July 2011. While we have not agreed on every decision made by the Bureau, they have always been open and willing to listen to the concerns of our industry as they finalized these new rules.

In May 2011, the CFPB began developing new mortgage disclosures using a nine round iterative process. Throughout this process, the CFPB invited industry and consumer comments on each draft of the new disclosure forms and conducted limited consumer testing in various cities across the country. ALTA and its members submitted comments to the CFPB during each round of the iterative process.

In addition, as part of the rulemaking process, the Bureau conducted a one-time Small Business Advocacy Review Panel (SBAR) pursuant to the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA). ALTA strongly supports the small business provisions in the Dodd-Frank Act, including the requirement that the Bureau conduct a small business review panel when a rule is expected to have a significant impact on a substantial number of small entities. This process is vital to ensuring that the Bureau's regulatory goals are met in a way that is not overly burdensome on small business. While our members found the process to be helpful, ALTA believes that targeted improvements can make the SBREFA process even more

effective to help the Bureau understand the impact a rule will have on small business and discover potentially less impactful alternatives.

First, the Bureau should give small entity representatives participating in the SBAR ample notice of the meeting so that they can make appropriate and cost effective travel arrangements. On February 21, 2012, the Bureau sent official invitations to small entity representatives for its March 6, 2012 SBAR panel on this rule. By providing only two weeks' notice, the Bureau made it unnecessarily costly for small entity representatives that do not live in the Washington, D.C., area to attend the panel meeting in person. For example, one ALTA member who attended the panel spent over $1,400 to attend the meeting. This is a substantial sum for a small business owner. The Bureau should aim to give participants at least one months' notice so they can make the appropriate travel arrangements.

Second, the Bureau should work with industry trade associations to better prepare the small entity representatives for the SBAR meeting. One of the main goals of the SBAR panel is to uncover how costly a regulation will be to implement for small business and to identify less-costly alternatives. There are many factors that go into an effective cost estimate, including differences in business processes across the country and vendor practice. In addition, information about alternatives that can reduce costs for small businesses may not be known to a small business owner unless they have the assistance from their trade association or their vendors. Conducting outreach to trade associations before holding the panel (including inviting trade associations to observe the panel meeting in person) ensures that the SBAR gets the most accurate cost data available.

Third, the Bureau should make the SBAR panel report public once it is complete. By publicizing the report earlier in the regulatory process, the Bureau can provide crucial information to industry stakeholders. This will allow industry to develop more useful data for the Bureau to consider about the impact of their proposals on small business.

Fourth, in addition to the above process-oriented changes, the Bureau also should consider broadening the way it looks at the impact of a regulation on small business. The SBAR panel focused heavily on the direct costs of this rule on small business, such as software costs, productivity and training, but amortized these costs over time. Small businesses have to invest in these changes to their business processes and procedures upfront in one-time costs.

Fifth, the SBAR panel glanced over the parts of this rule that could have indirect but very serious costs on small business. These indirect costs can be extraordinary,

including potentially preventing small business from being able to compete in the future marketplace.

An example is the panel's review of the proposals related to who completes the Closing Disclosure. Under the rule, the Bureau makes the lender ultimately liable for the accuracy of the Closing Disclosure even if they partner with a settlement agent to complete the form. While the panel focused on the direct costs of their new form, the indirect costs (namely that lenders would be incentivized to limit the number of small entities with whom they work) will be much more devastating to small business. The Bureau should take greater care to determine whether a proposal will cause business-model shifts that could be harmful to small-business competitiveness.

Lastly, the SBAR is a one shot event that comes late in the regulatory process. The SBAR occurs after the Bureau has decided on the need for a regulation, conducted research to support the regulation, and developed the substantive pieces of the regulation and just prior to a regulation being formally proposed in the Federal Register. This is late in the game and precludes the Bureau from considering, researching and testing alternatives that will be less costly to small business before publishing their proposal. A more effective process would be to have the Bureau consult with small businesses throughout the entire regulatory process.

It is important for Bureau staff and leadership to meet their "constituency" by attending conferences, roundtables and other industry forums. When Bureau staff attends industry meetings and our biweekly information exchange on industry compliance with the mortgage disclosures rule it provides a valuable forum for Bureau staff to hear directly from the people they regulate. This allows staff to get important information about how their rules are working in real life and what issues need clarification.

Our experience identified targeted improvements to make the SBREFA process even more effective. The SBREFA process is critically important to improving the intent and effect of regulations and is a good example of a more open and transparent process. Other Bureau rulemakings did not use the SBREFA process, including the Qualified Mortgage/Ability-to-Repay rule. Using the SBREFA process in additional rulemaking would foster more collaboration between the Bureau and those institutions it regulates and produce better outcomes for consumers.

Pilot Program for Electronic Mortgage Closings

Another good example of how a more transparent and open process has resulted in a better outcome for business and consumers is in the bureau's recently released study entitled: "Mortgage Closings Today: A preliminary look at the role of technology in

improving the closing process for consumers."[3] The report identified four key pain points that consumers and ALTA members experience at closing: not enough time to review closing documents; an overwhelming stack of paperwork; documents that are hard to understand and full of legalese and technical jargon; and finally that errors in the documents can lead to delays to closing.

This research was the result of ample input from industry and included literature review, analysis of closing packages, review of consumer complaints, preliminary industry interviews, targeted interviews of consumers and industry professionals, a public comment period to respond to a published Request for Information and demonstrations and discussions with technology companies. This transparent, open process resulted in a highly credible report that has received praise from industry and consumers.

ALTA welcomes this type of engaging, open and transparent process by the Bureau. Additional research will be needed to ensure that consumers and industry benefit from e-Closing. Accompanying the report was the publication of a Broad Agency Announcement (BAA) to learn more and seek proposals for new ways in which the Bureau can foster innovative technology solutions in this mortgage closing process.

Technology could mean that consumers can be provided documents and information earlier in the process instead of everything happening at closing. We need to think through how documents are received, how those documents are signed and returned, and then, how those documents are archived and stored.

We know that e-Closing is not about making people buy a home from a computer. Instead of replacing the personal interaction of buying a home, technology should enhance the personal interaction that settlement professionals provide to homebuyers. Throughout the process consumers should know about the documents received, the status of their transaction, what has already happened and what needs to be done and what their rights and responsibilities are when they sign their mortgage contract.

The more that we can streamline, provide uniformity and eliminate duplication, the more positive the entire experience is going to be consumers and ALTA members alike. Our industry looks forward to working with the Bureau to help foster innovative solutions to improve consumers' experience at closing. This research is being done because the CFPB is convening stakeholders together. The Bureau's influence to convene parties together is important.

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[3] http://files.consumerfinance.gov/f/201404_cfpb_report_mortgage-closings-today.pdf

Recommendations for further action

Based on these experiences, ALTA members believe three bipartisan ideas will improve outcomes for consumers and how the CFPB affects my business and those that I represent:

First, Congress should pass H.R. 4383. This bipartisan legislation introduced by Rep. Robert Pittenger and Rep. Denny Heck would establish a small business advisory board at CFPB, similar to those already established for outreach to community banks and credit unions. Advisory boards provide clear, formal and open channels of communication between Bureau staff and industry.

The CFPB created an advisory board for community banks and credit unions because it does not have regular contact with these institutions since the Bureau only supervises depository institutions with more than $10 billion in assets. Creating a similar advisory organization for nonbanks will allow these smaller institutions to report, advise or consult with the Bureau on a regular basis.

Second, direct the CFPB to establish procedures for issuing advisory opinions to financial service providers that it regulates. The best way to protect consumers and produce good outcomes for them is to discourage bad acts through enforcement while at the same time also encourage good behaviors. Today, the Bureau takes its enforcement role seriously; we encourage them to take their ability to promote good practices seriously too. An advisory opinion provides certainty to those complying with federal consumer financial law in real life situations.

Other federal agencies issue advisory opinions. This type of guidance, issued in response to a specific request, would improve certainty about whether a proposed design, operation or maintenance of consumer financial product or service would be prohibited under federal consumer law. Similar to how other federal agencies operate, in each opinion, the CFPB would apply legal standards to a set of facts and since each opinion applies to specific individuals or entities in specific situations, no third parties are bound by, nor may they legally rely on, an advisory opinion.

These advisory opinions should be made available to the public through the CFPB website. However, before publication of an advisory opinion, the CFPB should redact specific information about the requesting individuals or entities, and about any individuals or entities associated with the requestor, to the extent that it is reasonable to prevent release of any confidential business information or trade secrets.

Finally, the CFPB should improve the transparency of the process used to create bulletins and other guidance documents by encouraging public feedback to these actions. Substantive or legislative rules issued by Federal agencies, like the CFPB,

must undergo a public notice and comment rulemaking under the Administrative Procedures Act (APA). Comments are published in a public forum to promote transparency of rulemakings. These regulations issued by the CFPB benefit from public input and feedback and produce more effective regulations that meet the intended policy outcomes with fewer unintended consequences for small businesses.

Even though policy statements, guidance, and bulletins are exempt from public notice and comment rulemaking since they are intended to restate existing law, these documents can have a profound impact on industry and compliance. CFPB policy statements, guidance and bulletins would benefit from public feedback.

Whether a comment is provided to the CFPB on a rulemaking or a bulletin or other guidance document, this feedback should be made available to the public. Every day Members of Congress welcome public comment on the legislative proposals the House and Senate consider to enhance their formulation of a position on an issue. In many cases, soliciting transparent public comments on an issue promotes discussion that leads to better long term policy outcomes.

By publishing public comments on their website when a Bulletin is issued, the CFPB will provide an avenue for small businesses and others to reduce unintended consequences and produce better policy outcomes for consumers and industry.

Thank you for inviting me to testify today. ALTA is eager to serve as a resource to the Subcommittee, and I am happy to answer any questions.

Testimony of Edmund Mierzwinski,

U.S. PIRG Consumer Program Director

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at a hearing entitled "Legislative Proposals to Improve Transparency and Accountability at the CFPB"

Wednesday, May 21, 2014

Before the Subcommittee on Financial Institutions and Consumer Credit

House Committee on Financial Services

The Honorable Shelley Moore Capito, Chair

Testimony of Edmund Mierzwinski, U.S. PIRG Consumer Program Director at a hearing entitled "Legislative Proposals to Improve Transparency and Accountability at the CFPB"
Wednesday, May 21, 2014

Before the Subcommittee on Financial Institutions and Consumer Credit

Chair Capito, Representative Meeks and members of the committee:

Thank you for the opportunity to testify before the subcommittee on oversight of the Consumer Financial Protection Bureau. My testimony today is on behalf of the U.S. Public Interest Research Group. U.S. PIRG serves as the non-profit, non-partisan federation of state Public Interest Research Groups. The state PIRGs are public interest advocacy organizations that take on powerful interests on behalf of their members.

Summary:

We appreciate the committee's authority and responsibility to conduct oversight of the CFPB but after careful review we see no need for any of these 11 proposals before the committee to be considered any further. We urge their rejection.

None are necessary to protect consumers; none provide any necessary oversight function. Some roll back important authorities of the CFPB, especially its authority to ban or regulate the egregious practice of forced arbitration, a growing practice which has immunized corporate wrongdoing by making it impossible for consumers to obtain redress for harms. Others will subject the bureau to enormous regulatory burden and possible litigation risk, which will concomitantly increase the cost of government.

Further, these bills generally impose heightened requirements that are unique to the bureau, rather than imposing them all equally on all financial regulators. Instead of enacting these bills, we would urge the committee to more carefully review and credit the CFPB for its many successes. For example, the CFPB has recovered $1.5 billion for consumers in unfair credit card add-on fees and, working with other regulators, it has recovered an addition $2 billion for consumers based on mortgage market and other unfair practices. It has protected veterans from for-profit trade school scams and created a variety of tools for consumers, from students to older Americans, to help themselves avoid financial pitfalls.

Yet if these bills, and the already-House-passed HR 3193, the "Consumer Financial Freedom and Washington Accountability Act" rolling back the CFPB's independence and funding in a variety of ways, were to become law, financial markets could return to the abysmal conditions consumer faced prior to the 2008 financial collapse that led to a lingering recession that harmed consumers, communities and responsible businesses.

The CFPB is a work in progress. It is less than three years old, still growing and going through growing pains. But in addition to a variety of significant achievements in making markets work, it has also demonstrated an ability, as it did this week in response to both the employee compensation/evaluation and the FACA issues which the committee's oversight had helped illuminate, to respond quickly and properly to any legitimate identified problems. It should be allowed to stay on the job without burdensome, unnecessary new rules.

Introduction:

Last week, at the Federal Reserve Bank of Chicago, CFPB director Richard Cordray gave what many think was an important speech describing how the CFPB is working to protect consumers and make markets work.[1] We concur with his analysis.

> "We have been charged by Congress to assure that the markets for all of these consumer financial products are fair, transparent, and competitive. We expect a marketplace where companies are honest and clear so that consumers know the key terms and conditions of financial products up front, including pricing. We expect a marketplace where quality customer service is standard. And we expect a marketplace where financial products are designed to help consumers, not harm them."

His concluding remarks again point to the goal of making markets work:

> "Let me conclude by saying that good regulation is not about impeding market forces; it is about channeling those forces to make the marketplace work better. Good regulation supports strong markets that are more likely to deliver value to consumers over time."

The extant bills are not required in response to any problem. They will make it harder for the CFPB to do its job without any added benefit. That will harm consumers, communities, responsible businesses and the economy.

The CFPB is doing a good job. To paraphrase the late environmentalist Edward Abbey, the idea of the CFPB needs no defense, only more defenders.

Discussion of the proposals (in the order provided in the committee hearing memorandum).

Here are our comments on each of the bills. *Italicized matter* is from the committee summary.

H.R. 3389, the CFPB Slush Fund Elimination Act of 2013

> *"Introduced by Chairman Capito, the CFPB Slush Fund Elimination Act eliminates the Bureau's Civil Penalty Fund and requires the CFPB to remit fines it collects to the U.S. Treasury."*

We oppose this bill on the merits. We are also disappointed in the pejorative title of this bill. In our view, because the CFPB was established as a remedial agency, it should have broad authority to right wrongs and make markets work. The civil penalty fund's structure and work is based on a rulemaking. The civil penalty fund's activities are very narrow and clearly statutorily based. It is appropriate for a remedial agency to have both independent funding and control of additional monies to use for special remedial purposes directly related to its Congressional mandate.

The primary goal, consumer restitution, is being met. The fund is intended to help consumers who were harmed by bankrupt entities. The bureau has provided over $13 million in funds to over 4,000 consumers who were harmed by alleged fraudsters with no available assets, including, for example, Chance Gordon and Payday Solutions.[2] The bureau helped their victims by using the funds collected in penalties from other, more deep-

[1] http://www.consumerfinance.gov/newsroom/prepared-remarks-of-cfpb-director-richard-cordray-at-the-federal-reserve-bank-of-chicago-2/

[2] http://www.consumerfinance.gov/budget/civil-penalty-fund/

pocketed alleged violators. This is a positive outcome. Financial fraud is stopped; violators are punished; victims are made whole.

Further, it is entirely appropriate to have a secondary use for additional funds if available after victims have been made whole. Financial literacy is a task given the CFPB by Congress. To date, $13.38 million has been allocated from the Civil Penalty Fund, but not yet spent, for use to help selected military families and veterans and persons at economic risk for with these financial literacy programs. The CFPB was wise to pick populations at high risk of financial fraud. Again, not only were the funds targeted to achieve a priority task of the CFPB, they were targeted to help vulnerable populations that the Congress specifically mandated the CFPB to assist.

Further, this fund is not unique. The U.S. Department of Justice has a crime victim fund that it controls. The National Mortgage Settlement and some state Attorneys General offices may maintain similar, if not identical, funds. Passage of this bill will make it harder for CFPB to protect vulnerable, targeted populations, including military widows and widowers and others. We urge its rejection.

H.R. 3770, the CFPB-IG Act of 2013

> *Introduced by Representative Stivers, the CFPB-IG Act would create a separate, independent inspector general for the CFPB. The CFPB currently shares an inspector general with the Federal Reserve System.*

A review of the current Inspector General's detailed workplan for CFPB oversight shows that this proposed bill is unnecessary and should be opposed.[3] The IG has completed, is conducting and has planned a variety of CFPB oversight functions.

Further, as noted in letters to Congress in the past and in an October 2013 letter[4] to the Bipartisan Policy Center, the current IG has repeatedly stated it has the authority, resources and independence to conduct its CFPB oversight activities. In its letter to the BPC, an organization that had issued a report recommending, among other things, a separate IG for the CFPB, the IG highlighted a variety of mistakes in the group's analysis:

> "Contrary to your statement, I can assure you that our office does have the full audit, investigative, and reporting powers, including law enforcement authority, that are afforded to Inspectors General (IGs) under the IG Act of 1978, as amended. [...] Notably, the Dodd-Frank Act ensured that our office has "all of the authorities and responsibilities provided by [the Inspector General] Act with respect to the Bureau of Consumer Financial Protection [...]
>
> The Dodd-Frank Act also gave our office significant independence with respect to the CFPB. Specifically, the authority to designate an IG for the Board and the CFPB resides with the Chairman of the Federal Reserve Board, not the CFPB Director.[...]
>
> To state that we lack authorities granted to other IGs is incorrect and unfounded. As the IG for the CFPB, I can assure you that our office is well positioned to continue providing the vigorous CFPB oversight that Congress is seeking. **We believe, therefore, that a correction should be made to your report regarding your interpretation of our authorities, which serves as the basis for your recommendation that a separate IG be designated for the CFPB."** *(Emphasis added)*

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[3] http://www.federalreserve.gov/oig/files/OIG_Work_Plan.pdf

[4] Letter of 3 October 2013 from Inspector General Mark Bialek to Rick Fischer and Eric Rodriguez of the Bipartisan Policy Center, on file with the author.

H.R. 4262, the Bureau Advisory Commission Transparency Act

> *Introduced by Representative Duffy, the CFPB Advisory Commission Transparency Act clarifies that the Federal Advisory Committee Act (Pub. L. No. 92-463) applies to the CFPB.*

Just yesterday, the Bureau increased its longstanding voluntary compliance with FACA even further[5]

> To provide more transparency and to be responsive to the requests we've received, we're changing the format of our Board and Council meetings and opening these full meetings to the public. Starting with our June 18th meeting, the public may attend or watch the livestream of the full Consumer Advisory Board and Council meetings, the same way most other agencies allow under the Federal Advisory Committee Act.

These are positive steps to achieve what may be the major goal of sponsors of HR 4262. But we still believe that placing all the CFPB's advisory panels under the full requirements of the FACA would leave the CFPB no flexibility. This may work against some of the CFPB's other public policy goals, so we oppose the bill.

The CFPB is required by law to consider the needs of small business in developing any rules. Its statutory requirement is to consider those needs in temporary Small Business Review Panels that are established before Administrative Procedures Act rulemakings begin. The procedure, which only 3 agencies -- CFPB, EPA and OSHA -- are subject to, is designed to give small businesses a right to help develop proposed rules, before they are proposed. While FACA transparency and public participation requirements may not directly apply to the SBRPs, the benefits of this "sneak peak" for small business, an important opportunity for them to discuss their concerns before others get involved, would be at a minimum, diluted.

Further, as another unintended consequence, the bill could have a chilling effect on the ability of the Academic Research Council to do its work. Will CFPB economists still share preliminary methods and ideas with the academics who are supposed to help them refine those ideas if all meetings were fully public? Conversely, would the academics share their own research methods and comments with the CFPB if they knew that deliberations would be fully public? Preliminary research concerns should not be discussed in public meetings.

So, since the CFPB already voluntarily complies with much of the FACA wherever possible, and because complying with it in all circumstances could harm other important public policy goals of the bureau, the bill should be rejected.

H.R. 4383, the Bureau of Consumer Financial Protection Small Business Advisory Board Act

> *Introduced by Representative Pittenger, the Bureau of Consumer Financial Protection Small Business Advisory Board Act creates a small business advisory board at the CFPB.*

The CFPB's largest advisory board, the statutory Consumer Advisory Board, is already a multi stakeholder board comprised of a variety of members. It includes the views of financial firms. The CFPB already also has created community bank and credit union advisory councils to assure a deeper understanding of their business models. As above, the bureau also establishes Small Business Review Panels as required by law. It also has an Office of Financial Institutions and Business Liaison.

[5] http://www.consumerfinance.gov/blog/our-board-and-council-meetings-are-changing/

Creating yet another council or panel would be unwieldy and redundant. Further, if the FACA proposal above were to also apply, how would this bill's result square with FACA itself, which states:[6]

> 2. Findings and Purpose:
> (b) (2) new advisory committees should be established only when they are determined to be essential and their number should be kept to the minimum necessary;

Again, the bill is redundant and counterproductive and should not pass.

H.R. 4539, the Bureau Research Transparency Act

> *Introduced by Representative Fitzpatrick, the Bureau Research Transparency Act requires that CFPB research papers made available to the public be accompanied by all studies, data, and analyses on which the paper was based.*

This bill is very problematic. By requiring that any research paper issued by the bureau be accompanied by "all studies, data and other analyses on which the paper was based," the Congress would be dooming the bureau to analysis-paralysis and impossible-to-comply-with demands. Already, the Data Quality Act[7] provides safeguards for data integrity. So, this bill is redundant. It could also violate contracts with vendors and other channels from which CFPB receives data. As written, it appears that it would also violate the confidentiality of supervisory results. Further, if staff tested a variety of research models, would all of them need to be released?

The bureau already describes all its analyses. That's an adequate requirement. This burdensome, unclear bill should be rejected.

H.R. 4604, the CFPB Data Collection Security Act

> *Introduced by Representative Westmoreland, the CFPB Data Collection Security Act requires the CFPB to create an opt-out list for consumers who do not want the CFPB to collect personally identifiable information about them and to delete or destroy information about a particular consumer within a specified period of time following collection. It further requires CFPB employees accessing personally identifiable information about consumers to hold a 'confidential' security clearance.*

Last July, in detailed testimony[8] delivered before this subcommittee, CFPB Deputy Director Steve Antonakes stated that:

> "The Bureau collects and studies data in order to protect consumers throughout the United States in accordance with its statutory mandate, not to study any particular individuals."

As we understand it, the CFPB rarely collects Personally Identifiable Information (PII) unless it is voluntarily collected (with affirmative consent), for example, through the Public Consumer Complaint Database. The bureau collects much of its data from commercial vendors. Those data do not include PII. Data from other third parties do

[6] http://www.gpo.gov/fdsys/pkg/USCODE-2012-title5/html/USCODE-2012-title5-app-federalad-sec2.htm

[7] We merely point out that the Data Quality Act (implemented in 2002) already provides adequate coverage of any possible concerns sought by the pending legislation. This is not, however, an endorsement of the DQA. Its problematic provisions are discussed here by the Center for Effective Government: http://www.foreffectivegov.org/node/3479

[8] http://www.consumerfinance.gov/newsroom/steven-antonakes-before-the-house-committee-on-financial-services/

not include PII unless it is supervisory information that is already confidential. Passage of this bill would impede the bureau from collecting data, making it harder to do its job of handling consumer complaints, regulating financial firms and monitoring financial markets.

Problematic and costly would be the bill's requirement that the bureau create an opt-out right for consumers. But since the bureau either collects PII under an opt-in system, or on a confidential supervisory basis, to which consumers would the new opt-out be intended to apply?

Regarding the privacy breaches provision, the bureau already has an emergency response plan based on OMB requirements for all government agencies. That plan and the myriad other ways that the CFPB protects all data, including PII, are described in the Bureau's Privacy Impact Assessment, updated in December 2013.[9]

Further, the proposed bill states that the bureau is prohibited from collecting data without a confirmed director. If Director Cordray were to leave, would the bureau have to shut down all of its processes involving data collection until a new director is confirmed?

Further, the bill imposes security clearance requirements on any employee who handles PII, a requirement normally imposed for national security information. To the best of my knowledge, no other agency requires all employees who handle PII to have such a confidential clearance, although I have not had time to conduct a detailed review.

H.R. 4662, the Bureau Advisory Opinion Act

> *Introduced by Representative Posey, the Bureau Advisory Opinion Act establishes a process by which covered persons can submit inquiries concerning the conformance of prospective products and services with Federal consumer financial law and receive a confidential opinion from the Director.*

While some agencies have exercised their discretion to provide limited advisory committee processes in limited circumstances, I am unaware of any circumstance where Congress has mandated such a burdensome requirement as the Bureau Advisory Opinion Act. The bill raises serious concerns. It could significantly hamper supervision by tying up scarce resources.

Suppose there were allegedly conflicting opinions and one company sued to overturn its perceived disadvantage? That could result in endless, costly litigation. Further, were the bill to pass, its overbroad FOIA exemption provisions should be eliminated. We oppose the bill.

[9] **www.consumerfinance.gov/f/201312_cfpb_pia_admin-data-research.pdf**

Discussion Draft of the "Bureau Arbitration Fairness Act"

> *Representative McHenry's discussion draft of the Bureau Arbitration Fairness Act would repeal the CFPB's authority to prohibit, condition, or limit the use of arbitration provisions in contracts for consumer financial products or services.*

First, this bill should not be confused with the actual "Arbitration Fairness Act" (Johnson-GA),[10] HR 1844, which we support and would effectively ban forced (pre-dispute) arbitration in all consumer, worker and small business contracts by law. However, the 2010 Congress, in its wisdom, recognizing the importance of righting wrongs in the financial marketplace, also granted the CFPB (and the SEC for investors) the right to ban arbitration in certain financial contracts, due to the importance of the reform and the low probability of most pro-consumer legislation such as HR 1844 to ever be enacted as a free-standing bill.

Mr. McHenry's bill extinguishes that right, which only vests to the CFPB after completion of a report to Congress and a rulemaking. The proposal eliminates this important balancing provision even as the CFPB is conducting the required studies. We oppose the so-called "Bureau Arbitration Fairness Act."

We do not oppose the selection of arbitration as a remedy when it is voluntarily chosen after a dispute has arisen. However, the reality today is that boilerplate forced arbitration clauses that have been included in a variety of consumer contracts limit consumer ability to obtain redress and act to perpetuate corporate wrongdoing.

Markets have always been most effectively balanced when consumers are protected by multiple lines of defense against unfair practices. Strong laws are needed and strong federal regulators are needed to enforce them. Then, state attorneys general and state legislatures must be able to respond quickly to new threats and buttress the federal defenses. Finally, it is important to recognize that federal agencies and state agencies do not have adequate resources to solve every problem. So, consumers need private rights of action to defend themselves against unfair practices, either individually, or when the individual losses are small but the overall harm is great, in groups.

Yet, a variety of restrictions have been placed on consumer private rights of action. Perhaps the most harmful has been the growth of the use of boilerplate forced arbitration clauses in consumer contracts to bar court doors.

Unfortunately, the Supreme Court has held that (1) forced arbitration clauses can restrict individual legal rights even when the underlying contract itself is held to be illegal, (2) that the clauses may also include language preempting state laws holding that bans on class action rights are unconscionable and (3) that even when a class of consumers (or small business people) could not otherwise obtain "effective vindication" of their rights without banding together in a class, the Federal Arbitration Act prevails over state laws and instead requires the aggrieved victims to participate in individual arbitration proceedings.

Absent an ability for consumers to band together to redress wrongs, corporate wrongdoing is perpetuated. Yet, forced arbitration as a remedy is a flawed solution. Arbitration is a secretive, expensive process with no records and no appeal that favors repeat players over individual consumers.

One example that shows the need for financial services consumer class actions is the recent Bank Overdraft Cases. For years, America's largest banks had a practice of using sophisticated and specially designed software programs to maximize the number of overdraft fees charged to customers. The banks manipulated customer transactions records so that at the end of each day the customer's debit transactions were reordered from largest to

[10] HR 1844, the Arbitration Fairness Act, http://beta.congress.gov/bill/113th-congress/house-bill/1844

smallest – so-called high-to-low ordering – in order to produce more overdrafts, and consequently more overdraft fees, than if the debit transactions were processed chronologically. If a customer whose account has a $50 balance made four transactions of $10 and one subsequent transaction of $100 on the same day, the bank would reorder the debits from largest to smallest, imposing five overdraft fees on the customer instead of the one the consumer actually accrued. Overdraft fees are typically around $35, so they would charge the customer $175 in fees.

A number of successful class actions were filed against the banks to stop the practice and get refunds for customers overcharged. One judge held that the practice was "unfair and fraudulent." The judge held that the "decision to use high-to-low posting … was made in bad faith with the sole object being to increase the overdraft fees charged to customers." This was "unfair." The bank "failed to disclose … the challenged re-sequencing practice" and "made misleading statements to consumers regarding its re-sequencing practice." This was "fraudulent."

Ultimately these cases settled with the result being tens of millions of dollars of restitution for American who had been cheated. The Bureau, in part one of its required study, examined three of these cases and found that they provided relief to over six million people for abuses in the ordering/timing of overdraft charges. The financial relief provided was more than $120 million. The Bureau also looked at all the consumer arbitrations filed against banks with the American Arbitration Association over a three year period 2010-2012. During that three year period, only two people brought individual arbitration claims for overdraft ordering/timing.

So on the one hand, we have a system – the civil justice system which allows for class actions – that provided financial restitution to millions of Americans and reformed the practices of the nation's largest banks. And on the other hand, we have a system – private, individual, arbitration – that, at most, provided a refund to two people.

There are numerous other financial examples. Back when the court system could operate, payday lenders who'd violated Florida law were held accountable in class action settlements that paid out an average of over $300 to hundreds of thousands of consumers. Yet since the Supreme Court's arbitration rulings, the Florida Supreme Court has held that federal law requires the enforcement of class action bans even when they are proven to gut state consumer protection laws.[11]

One of the topics for the Bureau's study, pursuant to Congress' directive in Dodd-Frank, is a comparison of "the disposition of cases across arbitration and litigation (including class litigation), both in terms of substantive outcome and in terms of procedural variables like speed to resolution." Any honest study of that topic is going to find that financial services consumer class actions have restored hundreds of millions of dollars to Americans who have been cheated by big banks. That is exactly why the U.S. Chamber of Commerce and others don't want to see the study completed. We strongly oppose the McHenry proposal.

[11] http://publicjustice.net/blog/class-actions-against-payday-lenders-show-how-concepcion-has-been-used-gut-state-consumer-prote

Discussion Draft of the "Bureau Guidance Transparency Act"

> *Representative Stutzman's discussion draft of the Bureau Guidance Transparency Act would require that the CFPB, in issuing any guidance, provide a public notice and comment period before issuing the guidance in final form, and must make public any studies, data, and other analysis it relied on in preparing and issuing its guidance.*

We oppose the proposal. It is nothing less than a radical revision of the Administrative Procedures Act. Guidances are not generally subject to the APA. They are interpretative rules or policy statements. As other agencies often do, CFPB guidances may provide advice or reminders of existing requirements. The bill would eliminate warnings on emerging practices. Further and perhaps most problematic, interpretative clarification may sometimes be necessary to forestall unwarranted private litigation. The proposal is unnecessary and possibly harmful. We urge opposition.

Discussion Draft of the "Preventing Regulatory Abuse Act of 2014"

> *Representative Barr's discussion draft of the Preventing Regulatory Abuse Act of 2014 would require the CFPB to go through a formal rulemaking with public notice and comment in order to publish a final rule that gives clear guidance on the CFPB's definition of an "abusive" act or practice; would enact a moratorium on any enforcement action using the CFPB's "abusive" authority until the final rule is published; and would repeal the CPFB's authority to prohibit "abusive" acts or practices if it fails to conform to specified rulemaking timelines.*

We oppose the bill. Unfair, deceptive or abusive practices are all fact-specific. We don't see how you could write a rule that could apply to all industries and all circumstances.

Further the bill imposes impossible timelines. Within 15 days the bureau would have to issue a proposed rule, then provide a 90 day comment period and then finish the rule within a year. Scarce supervisory, enforcement and regulatory authorities would all be limited by the need to respond to the fire drill. It is also unclear whether the bureau would have the authority to conduct further rulemakings in the future, if it determined that there were new, previously unknown abusive practices. Finally, of course, the act already provides enough clarification of what is "abusive" for industry counsel to provide guidance.

Section 1031(d) of the Dodd-Frank Act already states:

> (d) ABUSIVE.—The Bureau shall have no authority under this section to declare an act or practice abusive in connection with the provision of a consumer financial product or service, unless the act or practice—
>
> > (1) materially interferes with the ability of a consumer to understand a term or condition of a consumer financial product or service; or
> >
> > (2) takes unreasonable advantage of—
> >
> > > (A) a lack of understanding on the part of the consumer of the material risks, costs, or conditions of the product or service;
> > >
> > > (B) the inability of the consumer to protect the interests of the consumer in selecting or using a consumer financial product or service; or
> > >
> > > (C) the reasonable reliance by the consumer on a covered person to act in the interests of the consumer.

If this statutory definition is not enough, counsel can refer to several enforcement cases where the abusiveness prong has been used against wrongdoers. Again, these cases are fact-specific. For example, in its case against the online loan servicer CashCall, the CFPB held that "collecting loan payments that consumers did not owe" constituted an abusive practice.[12] In its case against American Debt Solutions, the CFPB held that "signing up and charging fees to vulnerable consumers who the defendants knew had inadequate incomes to complete the debt-relief programs in which they were enrolled" constituted an abusive practice.[13] Again, this is another bill that is unnecessary, redundant and likely harmful to the bureau's ability to fulfill its mission.

Discussion Draft of the "Bureau Examination Fairness Act"

> *Representative Mulvaney's discussion draft of the Bureau Examination Fairness Act would prohibit the CFPB from including enforcement attorneys in examinations, regulate CFPB data requests during the course of examination, place time limitations on the completion of examination field work and the issuance of exam reports and supervisory letters, and prohibit concurrent limited-scope exams at the same institution.*

We oppose the "Bureau Examination Fairness Act." The bureau has already removed enforcement attorneys from examination visits, so the bill's intent is consistent with current practices. Yet the bill would not only absolutely bar ride-alongs, it possibly would prevent an examiner from calling an experienced enforcement attorney – perhaps one who has worked on a case against the firm -- to decide whether prohibited practices have recurred.

The bill would also impose a variety of coordination, data sampling and cost benefit requirements on the bureau. Its various restrictions on the length of examinations, deadlines for completion of exams and limits on the costs of data collection would harm the bureau's ability to conduct adequate supervision. Its "limited scope" concurring examination prohibitions are not defined and could be problematic, especially at larger entities.

While we generally believe that the committee's intent in this package of bills is largely to right perceived harms against smaller institutions, this bill in particular, for all the above reasons, appears to have its benefits accrue to larger institutions, at the expense of smaller ones. Finally, to our knowledge, none of the restrictions in this bill – or for that matter any of the others before you today that should be applied equally to all regulators – would also apply to the prudential regulators.

Conclusion:

Thank you for the opportunity to testify today. While we appreciate the committee's right to question the activities of any agency under its purview, we do not believe any of the proposals before you merit any further consideration and would, in fact, prevent the CFPB from carrying out its important mission. Again, the idea of the CFPB needs no defense, only more defenders.

[12] http://www.consumerfinance.gov/newsroom/cfpb-sues-cashcall-for-illegal-online-loan-servicing/

[13] http://www.consumerfinance.gov/newsroom/cfpb-takes-action-to-stop-florida-company-from-engaging-in-illegal-debt-relief-practices/

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TESTIMONY

INCREASING THE EFFECTIVENESS OF THE BUREAU OF CONSUMER FINANCIAL PROTECTION IN PROTECTING CONSUMERS

BY HESTER PEIRCE

Senior Research Fellow
Mercatus Center at George Mason University

Testimony Before the Financial Institutions and Consumer Credit Subcommittee
of the House Committee on Financial Services

May 21, 2014

Chairman Capito, Ranking Member Meeks, and members of the committee, thank you for the opportunity to testify today about needed reforms of the Bureau of Consumer Financial Protection. The Bureau's self-described mission is "to make markets for consumer financial products and services work for Americans—whether they are applying for a mortgage, choosing among credit cards, or using any number of other consumer financial products."[1] The Bureau's structural flaws threaten to undermine that mission. Today, I will discuss three of those flaws—the lack of accountability, the opacity of the Bureau's decision-making processes, and the flaws in the Bureau's organic statute—and potential avenues for addressing them in a manner that makes the Bureau more effective at protecting consumers. These incremental reforms are not a substitute for more fundamental reforms, such as placing the Bureau in the congressional appropriations process and replacing the director with a bipartisan commission.

The Bureau is rooted in a commendable desire to ensure that the financial system is meeting the needs of consumers. In a recent speech, Director Richard Cordray explained that the Bureau "seek[s] some fairly basic things," including "to hold financial companies accountable for being up front about the costs and risks of their products" and "to see that throughout the financial marketplace consumers are treated fairly and with the dignity and respect they deserve."[2] An agency that is not accountable and "up front" about the costs and risks of its regulatory actions and one that does not treat the entities it regulates fairly is not well positioned to achieve these objectives. Dodd-Frank created the Bureau without the structural features that are typically in place to help agencies function effectively.[3] While I cannot comment on the specific legislative text of the proposals before the Subcommittee today, the incremental reforms that I

1. Bureau of Consumer Financial Protection, "About Us," http://www.consumerfinance.gov/the-bureau/, accessed May 14, 2014..
2. "Prepared Remarks of CFPB Director Richard Cordray at the Federal Reserve Bank of Chicago," May 9, 2014, http://www.consumerfinance.gov/newsroom/prepared-remarks-of-cfpb-director-richard-cordray-at-the-federal-reserve-bank-of-chicago-2/.
3. For an analysis of the Bureau's structural flaws, see Todd Zywicki, "The Consumer Financial Protection Bureau: Savior or Menace?" *George Washington Law Review*, Vol. 81 (2013): 856-928.

discuss below, by addressing these structural weaknesses, should serve to improve the Bureau's ability to serve consumers.

LACK OF ACCOUNTABILITY

The Bureau's creators designed it to be independent of the President and Congress. Rather than being under the guidance of a politically balanced commission, the Bureau is run by a single director with a five-year term who may only be removed for cause—not for policy reasons. The President's authority over the Bureau's director is, therefore, quite limited, as is Congress's. The Bureau's budget comes not from Congress but from the Federal Reserve System's earnings in an amount—subject to a cap—determined by the Bureau's director. The Bureau also operates independently from the Federal Reserve, within which it is housed, and from the other regulators charged with overseeing banks' safety and soundness.[4] As a consequence, the Bureau's ability to fulfill its mission is inextricably tied to the whims, will, and weaknesses of the director who heads it.

Requiring the Bureau to have a dedicated inspector general would enhance the agency's limited accountability. An inspector general can play an important role in overseeing the operations of an agency and investigating potential misconduct by agency officials. The Bipartisan Policy Center recently recommended that "[a]n independent Bureau should have a correspondingly independent inspector general with full investigative and reporting powers."[5] Currently, the inspector general for the Board of Governors of the Federal Reserve System, who is appointed by the Federal Reserve Board chairman, is also responsible for overseeing the Bureau.[6] This sharing arrangement means that neither the Federal Reserve Board nor the Bureau is properly overseen. The inspector general's dual mission is particularly unworkable because Dodd-Frank substantially broadened the Board's regulatory authority.[7] The shared inspector general has produced valuable reports regarding the Bureau.[8] A presidentially appointed, Senate confirmed, dedicated inspector general would be able to provide more rigorous oversight.

The Bureau's examination function is another area in which additional accountability is needed. Through the examination process, agencies work with regulated entities to improve their compliance functions. Examinations afford an opportunity for educational interaction between a regulated entity and agency staff, and the end result may be a list of items for the regulated entity to address. Regulators, for their part, should strive to obtain the information they need without imposing undue burdens on the examined entity. This is particularly important for the Bureau, which regulates banks that are also being examined by one or more other regulators. The Bureau's decision to stop including enforcement attorneys on examination teams was wise.[9] Nevertheless, the Bureau continues to tout the usefulness of examinations as a source of enforcement actions.[10] While it is natural that some enforcement actions will arise from examinations, statutory limits on the way the Bureau plans, conducts, and

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4. The Financial Stability Oversight Council has limited ability to review Bureau regulations. 12 U.S.C. § 5513.

5. Bipartisan Policy Center, "The Consumer Financial Protection Bureau: Measuring the Progress of a New Agency," September 2013, p. 43.

6. See Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 1081, 124 Stat. 1376, 2080 (2010) (codified at 5 U.S.C. app. § 8G(c)).

7. See, for example, Hester Peirce and Robert Greene, "The Federal Reserve's Expanding Regulatory Authority Initiated by Dodd-Frank," infographic, Mercatus Center at George Mason University, November 13, 2013, http://mercatus.org/publication/federal-reserves-expanding-regulatory-authority-initiated-dodd-frank.

8. See, for example, Office of Inspector General, "The CFPB Can Improve the Efficiency and Effectiveness of Its Supervisory Activities," March 27, 2014, http://www.federalreserve.gov/oig/files/CFPB-Supervisory-Activities-Mar2014.pdf; Office of Inspector General, "The CFPB Should Reassess Its Approach to Integrating Enforcement Attorneys into Examinations and Enhance Associated Safeguards," December 16, 2013, http://www.federalreserve.gov/oig/files/CFPB_Enforcement_Attorneys_Examinations_full_Dec2013.pdf.

9. The Bureau explained to the inspector general that "we determined that by discontinuing CFPB enforcement attorneys' involvement in on-site examinations generally, and by clarifying enforcement attorneys' role in examination support, we would achieve greater capacity and more efficiency in all offices." Office of Inspector General, "The CFPB Should Reassess Its Approach to Integrating Enforcement Attorneys into Examinations and Enhance Associated Safeguards," December 16, 2013, p. 25.

10. Director Cordray recently explained that "[m]any of our most significant enforcement actions have occurred after the initial work was done by examination teams that identified violations and laid groundwork that was later taken up, developed, and completed by enforcement teams." "Prepared Remarks of CFPB Director Richard Cordray at the Federal Reserve Bank of Chicago," May 9, 2014.

closes examinations will serve to remind the Bureau that the core purpose of examinations is to foster voluntary compliance efforts—not to impose unnecessary costs and anxiety on entities trying to do the right thing.

OPACITY

In addition to its lack of accountability to the President and Congress, the Bureau operates without adequate transparency to the public. There are a number of areas in which transparency could be improved so that people affected by the Bureau's actions would have more notice and greater ability to offer input. It is critically important that the Bureau fully open its advisory committee meetings to the public, improve its communication with small banks and other small entities, and increase the transparency of the data and assumptions that underlie its decisions.

The Bureau draws on outside expertise through its Consumer Advisory Board and Community Bank Advisory Council, Academic Research Council, and Credit Union Advisory Council, but these groups' meetings are not, as a matter of course, open to the public.[11] The Federal Advisory Committee Act (FACA) requires that advisory committee meetings "be open to the public,"[12] but FACA does not apply to the Federal Reserve System, of which the Bureau is technically part.[13] The Bureau explains that, "[a]lthough not required to comply with FACA, the Bureau complies with the spirit of FACA by providing transparency into the discussions of each advisory group."[14]

Compliance in spirit is, in practical terms, selective compliance.[15] Full transparency is particularly important because the Bureau's director unilaterally selects the members of these committees.[16] In addition, with the exception of the Consumer Advisory Board, which was created by Dodd-Frank, the director also establishes these committees.[17] To the extent the Bureau holds public meetings, it should publicly identify the audience members whose expenses it covered.[18] There is nothing about the Bureau that would justify a departure from FACA, other than the agency's serendipitous, nominal placement within the Federal Reserve System.

The Bureau should be more open and communicative with small banks and other small businesses than it has been to date. In a recent survey that the Mercatus Center conducted, small banks told us that one of the biggest concerns they had was the Bureau.[19] Numerous banks cited uncertainty about the Bureau's actions as a cause of concern, even though the Bureau is not their direct regulator. More than half of respondents cited the Bureau as having a "significant negative impact" on their earnings.[20] The inspector general is working on a report on the Bureau's compliance with its obligations under section 1100G of Dodd-Frank to assess the effects of its regulations

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11. Bureau of Consumer Financial Protection, "Advisory Groups Meeting Details," http://www.consumerfinance.gov/advisory-groups/advisory-groups-meeting-details/, accessed May 15, 2014.
12. 5 U.SC. App. § 10(a)(1).
13. 5 U.S.C. App. § 4(b)(2).
14. Bureau of Consumer Financial Protection, "Advisory Boards and Councils: Frequently Asked Questions," p. 8, http://www.consumerfinance.gov/f/201401_cfpb_advisory-board-councils-faqs.pdf.
15. As a puzzling example of how the Bureau complies with the spirit of FACA, the Bureau explains that "CBAC, CUAC, and ARC will not hold meetings at which the public will be present." Ibid., p. 11. This statement appears to contradict the immediately preceding statement that "the CFPB board and council charters contemplate public access to meetings, which will be noticed in the Federal Register, recorded and archived." Ibid. In practice, public access does not appear to be the norm.
16. Ibid., p. 2 ("Except as provided by statute, regulation, or other Bureau directive, the authority to establish, utilize, renew, abolish, or appoint members to advisory boards or Board or Councils is reserved to the Director of the Bureau ("Director") and may be exercised only by him.")
17. The Bureau explains that the director's authority to establish these committees comes from "the inherent Dodd-Frank Act" and 41 C.F.R. 102-3.50(d). Bureau FAQs, p. 2.
18. For an example of when the Bureau did not disclose its agreement to reimburse an audience member's travel expenses, see Rachel Witkowski, "How the CFPB Seeks to Shape the Message," *American Banker*, April 1, 2014, http://www.americanbanker.com/issues/179_62/how-the-cfpb-seeks-to-shape-the-message-1066604-1.html?zkPrintable=1&nopagination=1.
19. Hester Peirce, Ian Robinson, and Thomas Stratmann, "How Are Small Banks Faring Under Dodd-Frank?," Mercatus Working Paper, Mercatus Center at George Mason University, February 27, 2014, http://mercatus.org/publication/how-are-small-banks-faring-under-dodd-frank.
20. Ibid., figure 41.

on small businesses, but the Bureau should not wait for the completion of this report to improve its outreach to small businesses.[21]

Transparency is also lacking with respect to the data, assumptions, and methodologies that underlie the Bureau's decisions. Such disclosures are commonplace for executive agencies as part of the regulatory impact analyses they are required to prepare. Circular A-4, which spells out how these analyses should be done, explains:

> A good analysis should be transparent and your results must be reproducible. You should clearly set out the basic assumptions, methods, and data underlying the analysis and discuss the uncertainties associated with the estimates. A qualified third party reading the analysis should be able to understand the basic elements of your analysis and the way in which you developed your estimates.[22]

The Bureau should be held to these same standards when it conducts analysis in connection with its rules and produces reports that may form the basis for subsequent rulemaking. Additional transparency would make it easier for outside experts to identify flaws or gaps in the Bureau's data, assumptions, or analysis.[23] The Bureau should welcome such input to ensure that its rules benefit consumers.[24]

Rulemaking conducted pursuant to the Administrative Procedure Act's (APA) notice-and-comment process affords interested parties an opportunity to comment and advance notice of a coming regulatory change. Regulatory agencies sometimes try to skirt these requirements by engaging in less transparent backdoor rulemaking.[25] The Bureau's avoidance methods include issuing guidance and using enforcement actions. For example, the Bureau issued guidance ostensibly directed toward indirect auto lenders that specified steps for compliance with existing law.[26]

An even more troubling practice is the Bureau's intentional perpetuation of statutory ambiguities in order to allow further clarification through enforcement actions. The most notorious example of this is the Bureau's decision not to define the unclear jurisdictional term introduced by Dodd-Frank—"abusive" act or practice—and choosing instead to retain the option of defining it through enforcement actions.[27] Congress should not permit the Bureau to settle into a practice of relying on non-APA rulemaking methods that deprive members of the public of the opportunity to participate in the development of the rules that will govern them.

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21. Office of Inspector General, "Work Plan," May 5, 2014, p. 12, http://www.federalreserve.gov/oig/files/OIG_Work_Plan.pdf.
22. Office of Management and Budget, "Circular A-4," September 17, 2003, p. 17.
23. For example, see the critical analysis of the Bureau's approach to data interpretation in a number of regulatory areas in, Adam C. Smith and Todd Zywicki, "Behavior, Paternalism, and Policy: Evaluating Consumer Financial Protection," Mercatus Center at George Mason University Working Paper No. 14-06, March 2014, pp. 17-26.
24. Todd Zywicki and G. Michael Flores, in reviewing the Bureau's white paper on overdraft fees, identified a number of holes in the Bureau's analysis and cautioned that a failure "to recognize these limits of the white paper could lead to subsequent regulatory and enforcement actions that may be harmful to consumers and the economy." G. Michael Flores and Todd J. Zywicki, "Commentary: CFPB Study of Overdraft Programs," November 2013, http://mercatus.org/publication/commentary-cfpb-study-overdraft-program.
25. For a number of examples of this phenomenon, see John D. Graham et al., "Mercatus Releases Five Academic Articles in the Harvard Journal of Law and Public Policy," May 13, 2014, http://mercatus.org/expert_commentary/mercatus-releases-five-academic-articles-harvard-journal-law-and-public-policy.
26. Bureau of Consumer Financial Protection, CFPB Bulletin 2013-02, March 21, 2013, http://www.consumerfinance.gov/f/201303_cfpb_march_-Auto-Finance-Bulletin.pdf. The Bureau's guidance effectively regulates automobile dealers, a group over which the Bureau does not have authority. Dodd-Frank § 1029 (codified at 12 U.S.C. § 5510).
27. Hester Peirce, "CFPB Knows Abuse When It Sees It," March 29, 2012, http://mercatus.org/expert_commentary/cfpb-knows-abuse-when-it-sees-it. Director Cordray suggested that "there is some guidance that we have provided around that set of terms—unfair, deceptive, and abusive acts or practices—in our examination manual, which is public and available on our Web site. And institutions have every opportunity to look carefully at that and to inquire with us and ask questions about anything that is unclear to them." "The Semi-Annual Report of the Consumer Financial Protection Bureau," Hearing Before the House Committee on Financial Services, 112th Cong., 2d Sess. 15 (March 29, 2012) (testimony of Richard Cordray, Director, Bureau of Consumer Financial Protection). Using enforcement manuals to proscribe conduct is another form of backdoor rulemaking. Institutions should not be forced to read examination manuals to determine what their legal obligations are.

STATUTORY FLAWS

Dodd-Frank's grant of authority to the Bureau allows the agency considerable discretion. Constraining this discretion in a number of areas, particularly in its discretion to spend penalties and its power to collect data, could help the Bureau to focus its efforts in productive ways and avoid taking actions for inappropriate reasons.

Dodd-Frank created a "Consumer Financial Civil Penalty Fund" into which penalties assessed by the Bureau are deposited. The Bureau is authorized to use this fund to pay victims or "for the purpose of consumer education and financial literacy programs."[28] The Bureau selects the recipient programs. The Bureau's ability to spend the penalty money it collects stands in contrast to standard practice, which is for agency penalties to go to the Treasury's general fund. The basis for this standard practice is sound: an agency that is permitted to apply penalty money for its own purposes has an incentive to levy higher penalties. The Bureau can effectively increase its budget by levying fines, and this is exactly what we see happening. By the close of fiscal year 2013, the Bureau collected $81.5 million, of which only $13 million went to directly compensate consumers.[29] If the Bureau's enforcement policies are perceived to be driven by its own interest in increasing the size of its civil penalty fund, the Bureau's legitimacy will be compromised.

Another area in which the Bureau's authority needs further constraints is data collection. To date, the Bureau's approach to data collection has been extremely expansive. As a consequence, the Bureau has access to sensitive information about consumers. For example, the Bureau collects data on the vast majority of credit card accounts, even though a much smaller sample size would be sufficient. George Mason University econometrician Thomas Stratmann demonstrated recently demonstrated that "a one percent sample will achieve the CFPB's goals while alleviating concerns about consumer privacy and costs."[30]

The Bureau's data collection efforts are not limited to consumers' credit card information. Last month, the Bureau's partner in another collection effort—the National Mortgage Database—announced that, starting next week, the database is being expanded to include a range of new information about mortgage borrowers, including their religion, major life events, detailed financial information, social security numbers, and employment records.[31] The database will be accessible to, among others, volunteers and interns and "the Consumer Finance [*sic*] Protection Bureau."[32] These large-scale collection efforts should not be undertaken without careful consideration of the potentially serious implications for the consumers whose data are being collected.

CONCLUSION

The flaws in the Bureau's design impair its ability to operate effectively for consumers. Although more fundamental reforms are needed, incremental reforms will help the Bureau to set appropriate priorities and seek relevant comments before acting. Making the agency more accountable, more transparent, and more focused will also make it more effective at ensuring that the financial system is serving the needs of consumers.

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28. 12 U.S.C. § 5497(d).
29. Bureau of Consumer Financial Protection, "Strategic Plan, Budget, and Performance Plan and Report," March 2014, p. 22, http://www.consumerfinance.gov/f/strategic-plan-budget-and-performance-plan-and-report-FY2013-15.pdf.
30. Letter from Thomas Stratmann to Scott Garrett, Chairman, Capital Markets and Government Sponsored Enterprises Subcommittee of the House Financial Services Committee, January 23, 2014, p. 1, http://mercatus.org/sites/default/files/StratmannCFPBStatisticMethods.pdf.
31. For a description of the changes, see Hester Peirce, "National Mortgage Database: Good for Regulators, Bad for You," Real Clear Markets, May 7, 2014.
32. Federal Housing Finance Agency, "Privacy Act of 1974; System of Records," 79 Federal Register 21,458, April 16, 2014, https://www.federalregister.gov/articles/2014/04/16/2014-08566/privacy-act-of-1974-system-of-records.

Statement of the U.S. Chamber of Commerce

ON: Legislative Proposals to Improve Transparency and Accountability at the CFPB

TO: U.S. House Subcommittee on Financial Institutions and Consumer Credit

BY: Andrew Pincus

DATE: May 21, 2014

The Chamber's mission is to advance human progress through an economic, political and social system based on individual freedom, incentive, initiative, opportunity and responsibility.

The U.S. Chamber of Commerce is the world's largest business federation representing the interests of more than 3 million businesses of all sizes, sectors, and regions, as well as state and local chambers and industry associations. The Chamber is dedicated to promoting, protecting, and defending America's free enterprise system.

More than 96% of Chamber member companies have fewer than 100 employees, and many of the nation's largest companies are also active members. We are therefore cognizant not only of the challenges facing smaller businesses, but also those facing the business community at large.

Besides representing a cross-section of the American business community with respect to the number of employees, major classifications of American business—e.g., manufacturing, retailing, services, construction, wholesalers, and finance—are represented. The Chamber has membership in all 50 states.

The Chamber's international reach is substantial as well. We believe that global interdependence provides opportunities, not threats. In addition to the American Chambers of Commerce abroad, an increasing number of our members engage in the export and import of both goods and services and have ongoing investment activities.

The Chamber favors strengthened international competitiveness and opposes artificial U.S. and foreign barriers to international business.

Positions on issues are developed by Chamber members serving on committees, subcommittees, councils, and task forces. Nearly 1,900 businesspeople participate in this process.

Madam Chairman, Ranking Member Meeks, and members of the Subcommittee.

My name is Andrew Pincus, and I am a partner in the law firm Mayer Brown LLP. Thank you for the opportunity to testify before the Subcommittee today on behalf of the U.S. Chamber of Commerce's Center for Capital Markets Competitiveness and the hundreds of thousands of businesses that the Chamber represents.

I will address two basic topics:

- First, why problems stemming from the uniquely unaccountable structure of the Consumer Financial Protection Bureau (CFPB) make it necessary for Congress to improve transparency and accountability at the Bureau; and

- Second, how the legislative proposals before the subcommittee at this hearing will improve transparency and accountability at the CFPB.

I. Congressional Action is Needed Now to Improve Transparency and Accountability at the CFPB

The Chamber strongly supports sound consumer protection regulation that deters and punishes financial fraud and predation and ensures that consumers receive clear, concise, and accurate disclosures about financial products. Everyone, businesses as well as consumers, benefits from a marketplace free of fraud and other deceptive and exploitative practices.

The Chamber also firmly believes, however, that consumers benefit from access to a broad range of competitive financial products and services. Access to credit allows small businesses to thrive, kids to go to college, and young couples to buy homes for their expanding families. The Chamber believes that such access to credit is best preserved when regulators allow competitive and transparent markets to flourish within the bounds of clear and consistently enforced rules of the road. Notably, Congress shared this belief when it established the CFPB, as it specifically tasked the Bureau with implementing and enforcing "Federal consumer financial law consistently for the purpose of ensuring that all consumers have access to markets for consumer financial products and services and that markets for consumer financial products and services are fair, transparent, and competitive."[1]

[1] Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank Act"), Pub. L. 111-203 § 1021(a) (July 21, 2010); 12 U.S.C. § 5511(a).

In order to implement and enforce Federal consumer financial law "consistently," to ensure consumers have access to financial services, and to ensure that the markets for financial products and services remain "fair, transparent, and competitive," the CFPB must:

- Provide clear rules of the road for financial services companies;
- Solicit input from stakeholders, including small businesses, prior to taking action;
- Perform appropriate cost-benefit analyses to determine the prudence of any contemplated regulatory activity;
- Respect Americans privacy and avoid unnecessary risks of identity theft and financial fraud;
- Respect the limits of its jurisdiction and authority.

The entire marketplace will benefit if the CFPB meets these basic standards.

Unfortunately, rather than transparency, accountability, and understandable standards that create a level playing field for businesses and a consistent level of protection for consumers, the CFPB's actions have often been marked by the absence of all three of these characteristics. Frequently, the CFPB has utilized a closed decisionmaking process, ignored or circumvented limits on its authority, and announced vague standards that provide no guidance for law-abiding companies.

As this Subcommittee has heard many times before, the CFPB's unique structure – with its absence of the checks and balances that apply to other federal agencies – facilitates insular, vague policymaking that often fails to consider how Bureau actions will impact consumers' and small businesses' access to credit.

***First,* the CFPB repeatedly has chosen to set policy by imposing after-the-fact liability through enforcement actions, rather than through notice-and-comment rulemaking, guidance, or any other process designed to gather public input and analyze the costs and benefits.** As the Bipartisan Policy Center has explained, bad policy is the inevitable result.[2] Every market participant considering whether to offer low-cost and innovative credit products must take into

[2] Bipartisan Policy Center, *The Consumer Financial Protection Bureau: Measuring the Progress of a New Agency*, at 5, 19 (Sept. 2013) ("[W]hen the Bureau made unilateral decisions, rolled out initiatives, rules, or processes as a result of a more closed, internal deliberation process, the results were far more likely to be problematic" than if notice-and-comment rulemaking was undertaken).

account the risk of future second-guessing by the Bureau in "gotcha" enforcement actions. This legal uncertainty inevitably will increase consumers' costs, reduce product offerings, and restrict credit availability across the full array of financial products. For example:[3]

- The Bureau has declined to seek public comment on or clarify the meaning of its abusiveness authority through a transparent process. Instead, the CFPB has preferred to develop the meaning of this term through enforcement actions. In doing so, the CFPB has appeared to enforce the very kind of suitability requirements that this Committee and Congress rejected in crafting the Dodd-Frank Act.

- The CFPB has not sought public comment on nor fully explained how it determines whether an indirect auto lender is in compliance with the Equal Credit Opportunity Act or how impermissible disparate impact may be identified in a lending portfolio. Lenders work hard to comply with Fair Lending laws and it is not fair for an agency to hold them to an invisible, statistical standard.

- The Bureau has not sought public comment on or provided meaningful guidance on the compliance systems that covered institutions should put in place to oversee third-party service providers properly and avoid vicarious liability. Instead, the CFPB appears to have taken the view that financial institutions may be held strictly liable for any error by a service provider, no matter how stringent the institution's compliance system.

- The Bureau has not established a no-action letter process or other means of providing authoritative guidance to financial institutions facing specific and complicated compliance questions arising under the statutes and regulations that the CFPB enforces.

- The CFPB has not been transparent regarding its study of arbitration contracts. As a result, stakeholders cannot give specific input into the areas that the Bureau is studying and the CFPB accordingly is working in an informational vacuum. A legitimate study process would facilitate the submission of such information.[4]

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[3] For a fuller discussion of these issues, see Letter from David Hirschmann to Hon. Richard Cordray (Feb. 12, 2014), *available at* http://www.centerforcapitalmarkets.com/wp-content/uploads/2014/02/2014-2.12-CFPB-Letter.pdf.

[4] *See generally* Letter from David Hirschmann and Lisa A. Rickard to Ms. Monica Jackson re. Request for Information Regarding Scope, Methods, and Data Sources for Conducting Study of Pre-Dispute Arbitration

- By electing not to undertake formal rulemakings, the CFPB has side-stepped the Small Business Regulatory Enforcement Fairness Act. Moreover, the CFPB has treated SBREFA as a burden, not as an opportunity to improve policy outcomes.[5] As a result, even where the CFPB has been in technical compliance with the law, it repeatedly has pursued its preferred policy ends without meaningful input from small businesses and others whose input Congress has specifically sought to guarantee.

***Second*, the CFPB is not respecting the statutory limits on its jurisdiction and authority.** As a result, the CFPB is imposing regulatory costs and legal uncertainty upon segments of the economy that Congress specifically excluded from the Bureau's jurisdiction. For example:

- The CFPB has treated its lack of jurisdiction over auto-dealers as nothing more than a technical impediment to be overcome, circumventing this clear statutory restriction by using its jurisdiction over financial institutions that provide indirect auto loans as a lever to try to force change in the compensation model used by dealerships.

- The CFPB has paid little heed to the statute's merchant exclusion.[6] The purpose of this exclusion was clear: Congress intended for the CFPB to have authority over banks, credit card companies, and other financial services companies, but not to be able to use the incidental provision of financial services as a means of gaining authority over any type of company. The CFPB has not respected this limitation, however. For example, in undertaking a rulemaking on debt collection, the CFPB has indicated its willingness to treat merchants who try to collect on defaulted accounts in the same manner as third-party debt collectors who have no customer relationship with the debtor.[7]

- The CFPB has collected data during its supervisory examinations without, as required by statute, first issuing an appropriate rule or order

Agreements, No. CFPB-2012-0017—Supplemental Submission (Dec. 11, 2013), *available at* http://www.instituteforlegalreform.com/uploads/sites/1/2013_12.11_CFPB_-_arbitration_cover_letter.pdf.

[5] *See generally* Letter from Trade Associations to the Hon. Sam Graves and the Hon. Nydia Velázquez (Aug. 1, 2012), *available at* http://www.centerforcapitalmarkets.com/wp-content/uploads/2010/04/2012-8.01-Joint-Letter-House-Small-Business-re-CFPB.pdf.

[6] *See* Dodd-Frank Act § 1027(a).

[7] *See generally* Letter from Jess Sharp to Ms. Monica Jackson re. Advance Notice of Proposed Rulemaking, "Debt Collection (Regulation F)," No. CFPB-2013-0033 (Feb. 28, 2014).

to that end.[8] Relatedly, the CFPB limited a request for data to nine institutions so that it would not have to comply with the requirements of the Paperwork Reduction Act, 44 U.S.C. §§ 3501-3521, which limits the paperwork burden that the federal government may impose on American businesses.[9]

***Third*, the CFPB has gathered enormous amounts of Americans' personal financial information, thereby unnecessarily increasing the risk of government abuse of private data and of a data breach that will result in identity theft and financial fraud.** The CFPB likewise has refused to be transparent about its handling of this data. For example:

- As noted above, the CFPB has collected vast amounts of information during its supervisory examinations, and repeatedly has failed to explain why it is necessary to gather such volumes of information.[10]

- The CFPB now is working with the Federal Housing Finance Agency on a mortgage database that tracks enormous quantities of Americans' personal and financial information on an ongoing basis.[11]

This lack of transparency and accountability extends beyond the Bureau's treatment of the private sector – and includes its treatment of requests by Members of Congress. Despite the repeated requests from countless members of Congress from both sides of the aisle, the CFPB has declined to give a detailed description of how it performs its disparate impact analysis in the indirect auto lending context.

II. Legislative Proposals to Improve Transparency and Accountability at the CFPB

The CFPB's history to-date has confirmed the Chamber's fears that the Bureau's unprecedented structure with its lack of routine checks and balances would produce agency action inconsistent with federal agency norms. The Chamber consequently has supported legislation that would incorporate the controls and

[8] *See generally* Letter from David Hirschmann to Hon. Richard Cordray (July 19, 2013), *available at* http://www.centerforcapitalmarkets.com/wp-content/uploads/2010/04/2013-6-19-CFPB-letter-on-data-collection.pdf.
[9] *See* 44 U.S.C. § 3502 (defining "collection of information" to include obtaining "answers to identical questions posed to, or identical reporting or recordkeeping requirements imposed on, *ten or more* persons, other than agencies, instrumentalities, or employees of the United States") (emphasis added).
[10] *See id.*
[11] *See* Letter from David Hirschmann to Mr. Alfred M. Pollard re. "Privacy Act of 1974; System of Records – Notice of Revision and Request for Comments re. the National Mortgage Database," No. 2014-N-03 (May 16, 2014), *available at* http://www.centerforcapitalmarkets.com/wp-content/uploads/2013/08/5-16-14-Comment-re-FHFA-database.pdf.

oversight that apply to other federal regulatory agencies, which would in turn ensure far greater stability over the long-term for those who provide and rely on consumer credit. For example, the Chamber strongly supports H.R. 3193, the Consumer Financial Freedom and Washington Accountability Act. That bill, which the House of Representatives passed in February, would bring the CFPB in line with other independent agencies, including by codifying the commission structure that was originally proposed by this Committee and by restoring congressional control over the CFPB's budget.

The Chamber likewise welcomes other proposals that would:

- Increase the agency's transparency;
- Increase the CFPB's accountability to Congress;
- Strengthen checks and balances on the exercise of the CFPB's authority;
- Limit the CFPB's discretion to impose new requirements and burdens on financial institutions without first soliciting public input;
- Protect Americans' privacy; or
- Clarify legal requirements imposed by the Dodd-Frank Act.

To that end, the Chamber thanks the sponsors and cosponsors of the bills that are the subject of today's hearing. These bills represent an important step in the debate about ensuring an open, transparent, inclusive policymaking process at the CPFB, and we appreciate the sponsors' willingness to reach across the aisle in many cases to address targeted, practical issues that will improve outcomes for businesses and consumers.

A number of these measures would directly address the Bureau's lack of transparency:

- **H.R. 4262 – The Bureau Advisory Commission Transparency Act**, introduced by Representative Duffy, would close the statutory loophole exempting the Bureau's advisory committees from the Federal Advisory Committee Act ("FACA"), 5 U.S.C. App., which generally requires federal agencies to hold meetings of advisory committees in public and to satisfy various other procedural requirements. Because FACA exempts the Federal Reserve and the CFPB technically is housed within the Federal Reserve, FACA does not apply. The CFPB has taken advantage of this loophole in

FACA and has held meetings of this advisory board behind closed doors, with a carefully choreographed public session only occurring at the end of the meeting.

But the statute's exemption of the Federal Reserve, like its exemption of the CIA, is a product of the sensitive economic and national security issues discussed by their respective advisory committees. There is nothing to distinguish the Bureau's advisory committees from those of the Federal Trade Commission, Securities and Exchange Commission, or any other federal agency. Indeed, given the fact that the statute expressly provides that the Federal Reserve cannot exercise any authority over the CFPB, there is no basis for permitting the Bureau to invoke the Federal Reserve's FACA exemption.

- **H.R. 4539 – The Bureau Research Transparency Act**, introduced by Representative Fitzpatrick, would require the CFPB to share the data behind the reports it generates. Data sharing is a basic component of any reliable and credible research review process. To date, however, the CFPB has been unwilling to share the data behind its research reports. That prevents scrutiny of the CFPB's analysis. Of course, any data released by the Bureau should be scrubbed of any personally-identifiable information and sensitive business information.

- **Discussion Draft – The Bureau Guidance Transparency Act**, circulated by Representative Stutzman, would require the Bureau to provide an opportunity for public notice and comment before issuing interpretive guidance – and to publish the data underlying conclusions in any such guidance. As I have discussed, the Bureau repeatedly has announced interpretive guidance without previously giving public notice or soliciting meaningful stakeholder input. This measure would require the Bureau to gather information about the impact of its planned guidance before the guidance may be issued.

- **H.R. 4383 – The Bureau of Consumer Financial Protection Small Business Advisory Board Act**, introduced by Representatives Pittenger and Heck, would require the CFPB to create a small business advisory board. The Chamber repeatedly has urged the CFPB to improve its outreach to small business and this measure would create an important mechanism for increasing the voice of small business at the CFPB.

- **Discussion Draft – The Bureau Arbitration Fairness Act**, circulated by Representative McHenry, addresses the Bureau's authority to ban or regulate arbitration under Section 1028 of the Dodd-Frank Act. The statute requires the Bureau to undertake a study of arbitration prior to exercising this regulatory authority and serious concerns have been raised about the fairness of the study process. While the Bureau did invite public comment on how it should conduct the study, it has never identified the topics it is studying or invited public comment on those topics. Indeed, the Bureau has been more transparent about a consumer survey that it is planning to conduct – because the Paperwork Reduction Act imposes specific notice and comment requirements – than it has been about the much broader arbitration study.

Other proposals would take important steps toward increasing the Bureau's accountability:

- **H.R. 3389 – The CFPB Slush Fund Elimination Act**, introduced by Chairman Capito, would prevent the Bureau from using the statutory civil penalty fund as yet another non-appropriated financial resource to be spent as the Bureau wishes without any oversight from Congress, the President, or anyone else. Congress created the fund, in Section 1017(d) of the Dodd-Frank Act, to enable the Bureau to compensate injured investors. But the Bureau has used other authority to accomplish that end[12]; civil penalties that the Bureau collects would be therefore appropriately deposited in the Treasury's General Fund, and subject to Congress's oversight and control.

- **H.R. 3770 – The Bureau of Consumer Financial Protection-Inspector General Reform Act**, introduced by Representative Stivers, Representative Walz, Representative Bachmann, and Representative Miller, would create a dedicated Inspector General for the Bureau. The Dodd-Frank Act granted the Inspector General of the Federal Reserve responsibility for oversight of the CFPB. As a result, the CFPB lacks a dedicated oversight entity that focuses exclusively on the specific challenges and shortcomings of the CFPB. H.R. 3770 would remedy each of these flaws.

- **H.R. 4604 – The CFPB Data Collection Security Act**, introduced by Representative Westmoreland,[13] would require the CFPB to establish an opt-

[12] Chairman Capito introduced this legislation on behalf of herself and Representatives Huizenga, Westmoreland, Cotton, Garrett, Campbell, Luetkemeyer, Duffy, Bachus, Posey, and Pittenger.
[13] Joining Representative Westmoreland in introducing this legislation were Representatives Duffy, Bachmann, Long, Posey, Bentivolio, and Luetkemeyer.

out list for consumers who do not want the CFPB to collect personally identifiable information about them, as well as establish other important protections. Congress imposed clear limits on the collection of Americans' personally identifiable information,[14] but the CFPB nonetheless has gathered huge amounts of personally identifiable information through the performance of its supervisory function—all while failing to adhere to the statutory requirement that it first issue a rule or order before attempting such a collection.[15] The Chamber and many Members of Congress have expressed concern about the Bureau's access to such information, and the Government Accountability Office has raised concerns about the security of data at the CFPB. This bill responds to those concerns.

- **Discussion Draft – The Bureau Examination Fairness Act**, circulated by Representative Mulvaney, addresses significant concerns about the basic fairness, and compliance with statutory standards, of the Bureau's examination process. These concerns have included:
    - The inclusion of enforcement attorneys in its examinations, changing a collaborative process into a hostile one;
    - The use of multiple, conflicting, and unduly burdensome requests for financial data;
    - The extraordinary length of examinations; and
    - Subjecting supervised businesses to multiple simultaneous examinations of varying scopes and topics.

  Addressing these issues of fairness is essential to eliminate unfair and costly burdens that are passed along to consumers in the form of higher prices.

Finally, there are measures that would allow law-abiding companies to understand in advance what the relevant statutes and regulations require, eliminating the "gotcha" approach that uses enforcement to set regulatory standards without prior notice to companies:

- **H.R. 4662 – The Bureau Advisory Opinion Act**, introduced by Representative Posey, would require the Bureau to do what other federal

[14] *See id.*
[15] *See generally* Letter from David Hirschmann to Hon. Richard Cordray (July 19, 2013), *available at* http://www.centerforcapitalmarkets.com/wp-content/uploads/2010/04/2013-6-19-CFPB-letter-on-data-collection.pdf.

agencies did long ago: "establish a procedure to provide responses to specific inquiries by a covered person concerning conformance of prospective conduct with the Federal consumer financial law."

- **Discussion Draft – The Preventing Regulatory Abuse Act of 2014**, circulated by Representative Barr, relates to the Bureau's unwillingness to provide companies with any useful understanding of the scope of the statutory "abusive" standard. As I have discussed, companies that wish to comply with the law have no idea what that standard requires because the Bureau's existing "guidance" consists of a repetition of the broad statutory language, and the Bureau's filings in enforcement actions appears to adopt an extraordinarily broad definition of the term, encompassing the very suitability standards that Congress removed from the Dodd-Frank Act. Clarification of this standard is essential to avoid an adverse effect on the availability of consumer credit, which is critical to small businesses as well as to consumers, and to provide basic fairness to companies that want to comply with the law.

* * * * *

Chairman Capito and Ranking Member Meeks, thank you again for the opportunity to testify today on these important legislative proposals to improve transparency and accountability at the CFPB. I would be happy to answer the Subcommittee's questions.

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May 20, 2014

The Honorable Shelley Moore Capito
Chairman
Subcommittee on Financial Institutions
and Consumer Credit
United States House of Representatives
Washington, DC 20515

The Honorable Gregory Meeks
Ranking Member
Subcommittee on Financial Institutions
and Consumer Credit
United States House of Representatives
Washington, DC 20515

Dear Chairman Capito and Ranking Member Meeks:

On behalf of the Credit Union National Association (CUNA), I am writing today to thank you for holding today's hearing entitled "Legislative Proposals to Improve Transparency and Accountability at the CFPB." CUNA is the largest credit union advocacy organization in the United States, representing America's state and federally chartered credit unions and their 99 million members. We appreciate the opportunity to submit our views for the record of the hearing.

The Subcommittee is considering several bills designed to increase transparency and accountability at the Consumer Financial Protection Bureau. Credit unions have significant interest in the activities of the Bureau because even though credit unions with less than $10 billion in assets are exempt from the Bureau's examination authority, they are not exempt from the Bureau's rulemaking authority. As we discuss below, CUNA is supportive of several of the bills under consideration, including H.R. 3770, the CFPB-IG Act; H.R. 4383, the Bureau of Consumer Financial Protection Small Business Board Act; H.R. 4262, the Bureau Advisory Commission Transparency Act; and H.R. 4662, the Bureau Opinion Advisory Commission Act.

Discussion Draft of the "Bureau Guidance Transparency Act"
This draft bill, presented by Representative Stutzman, would require the Bureau to provide a public notice and comment period before issuing any guidance in final form. This would be helpful for credit unions during the examination process.

For instance, in 2013, the Bureau issued guidance in the form of a compliance bulletin on indirect automobile lending without a public comment period. Examiners often treat guidance as if it were a regulation. Equally troubling is the trend of other Federal regulatory agencies issuing guidance without a public notice and comment period and then subsequently treating such as if it were a regulation. CUNA looks forward to working with the bill sponsor to perfect this legislation.

Discussion Draft of the "Preventing Regulatory Abuse Act of 2014"
The draft of this bill being circulated by Representative Barr addresses a serious concern by many in the financial services industry. The Bureau has failed to define the term "abusive" when referring to unfair, deceptive and abusive practices. The draft bill requires the Bureau to initiate rulemaking to define the term 'abusive' with a 90-day comment period and provides the Bureau with up to one year to finalize a rule for the term "abusive." It would be very helpful for all actors in the financial services industry to know what, precisely, the Bureau defines as "abusive."

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The Honorable Gregory Meeks
May 20, 2014
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The draft bill also indicates that the failure to issue a final rule within the specified timeframe would remove the Bureau's authority to declare an act or practice as abusive in connection with the provision of consumer financial product or service. However, the legislation does not indicate whether this would be an indefinite prohibition or until a rule is finalized. Credit unions originally supported the concept of a consumer financial protection agency in order to regulate those previously unregulated – including payday lenders and other predatory lenders. We are concerned that without additional clarification, a consequence of the legislation may be to permanently impair the Bureau's ability to protect consumers from unscrupulous actors. We encourage the Subcommittee to consider clarifying that if the Bureau is unable to promulgate a definition of "abusive" within the time allotted by the bill, that the Bureau's ability to declare an act or practice abusive is removed until such time as the Bureau defines the term "abusive."

H.R. 3770 - The CFPB-IG Act of 2013
This bill, introduced by Representative Stivers, would create an independent inspector general for the Bureau. Currently, the Inspector General of the Federal Reserve Board also serves as the Inspector General for the Bureau.

Given the size of the Bureau and the scope of its mission, we believe it is appropriate for the Bureau to have its own inspector general and we support this legislation.

H.R. 4383, the Bureau of Consumer Financial Protection Small Business Board Act
The Bureau of Consumer Financial Protection Small Business Board Act, as introduced by Representative Pittenger, would create a small business advisory board at the Bureau. The Consumer Advisory Board is already codified in statute. While we support the notion of establishing an advisory board focused on small business issues, we would ask the Subcommittee to consider also codifying the Credit Union Advisory Council (CUAC) as part of this legislation. CUNA testified in support of this concept on April 10, 2013.

Shortly after the Bureau was established, the Bureau leadership announced the creation of the CUAC. This group, the creation of which CUNA strongly urged, advises the agency on the impact of the Bureau's proposals on credit unions, sharing information, analyses, recommendations and the unique perspective of not-for-profit financial institutions with the agency director and staff. However, since the CUAC is not required by law, it could be abolished at any time. We believe the CUAC is an important resource for the Bureau because it provides a forum for credit union officials to provide direct feedback to the Bureau on how its proposals and final rules will affect how credit unions serve their members.

We ask Congress to codify the Credit Union Advisory Council and to require the Bureau to reimburse CUAC members for their travel and lodging expenses incurred to attend meetings of the CUAC.

H.R. 4262 - The Bureau Advisory Commission Transparency Act
Introduced by Representative Duffy, H.R. 4262 would clarify that the Federal Advisory Committee Act (Pub L. No. 92-463) applies to the Bureau. This legislation would, in effect, open Bureau advisory committee meetings to the public.

As noted above, while not required to do so by Congress, the Bureau established a Credit Union Advisory Council (CUAC). This group meets four times a year, and at least half of the meetings may be in person at the Bureau headquarters. These meetings are not open to the public. However, we feel these meetings should be open to public observation as they provide an important forum for credit union representatives to share

The Honorable Shelley Moore Capito
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concerns and provide practical guidance to the agency on operational and public policy issues. CUNA supports this legislation.

H.R. 4662, the Bureau Advisory Opinion Act
Introduced by Representative Posey, H.R. 4662 directs the Bureau to create a process by which entities subject to Bureau rulemaking, including credit unions, can submit questions to the Bureau about the conformance of prospective products and services and receive within 90 days of such request a confidential opinion from the Director of the Bureau on the conformance of the prospective product with Federal consumer financial law. In addition, any covered person that receives such guidance shall have a rebuttal presumption in a court should the financial product be later challenged by the Bureau.

CUNA supports this legislation; however, we would suggest the Subcommittee consider adding rule of construction language clarifying that the bill is not intended to require any covered person to seek guidance or approval from the Bureau prior to offering a product to its members or customers.

Discussion Draft of the "Bureau Examination Fairness Act"
This draft bill would improve the examinations process for credit unions that are examined by the Bureau. First, it would prohibit the Bureau from including enforcement attorneys in examinations, regulate Bureau data requests during the course of the examination, place time limitations on the completion of examination field work and the issuance of exam reports and supervisory letters, and prohibit concurrent limited-scope exams at the same institutions. Recognizing the need for efficient and meaningful exams, as well as the judicious use of credit union resources during such examinations, we believe this legislation takes a step in the right direction.

It has been nearly four years since the enactment of the Dodd-Frank Act and the creation of the Bureau. It is appropriate for Congress to give serious consideration to legislation designed to improve the accountability and transparency of the Bureau. On behalf of America's credit unions and their 99 million members, thank you very much for holding this hearing and considering our views.

Best regards,

Bill Cheney
President & CEO

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May 20, 2014

The Honorable Shelley Moore Capito
Chairman
House Financial Services Subcommittee on
Financial Institutions and Consumer Credit
United States House of Representatives
Washington, D.C. 20515

The Honorable Gregory Meeks
Ranking Member
House Financial Services Subcommittee on
Financial Institutions and Consumer Credit
United States House of Representatives
Washington, D.C. 20515

Re: Support for Transparency and Accountability at the Consumer Financial Protection Bureau

Dear Chairman Capito and Ranking Member Meeks:

On behalf of the National Association of Federal Credit Unions (NAFCU), the only trade association exclusively representing the interests of our nation's federal credit unions, I write today in advance of tomorrow's scheduled hearing, "Legislative Proposals to Improve Transparency and Accountability at the Consumer Financial Protection Bureau (CFPB)." NAFCU appreciates the subcommittee examining proposals to accomplish this goal.

As you know, Members of Congress on both sides of the aisle have acknowledged that credit unions were not the cause of the financial crisis. While NAFCU has long recognized the need for additional consumer protection in the financial services arena, we were the first credit union trade association to oppose CFPB authority over credit unions given their record of member service and the existing laws and regulations they are subject to. While NAFCU maintains that the CFPB should not have authority over credit unions, it has become clear through the rule writing and the examination processes that credit unions are firmly within reach of the new regulatory body. Accordingly, NAFCU member credit unions and their 97 million member owners have a vested interest in ensuring the CFPB operates in a fair and transparent way.

NAFCU believes today's hearing is an important one, as it is critical for the day-to-day operations of credit unions to have a clear understanding of how the CFPB operates. A number of the legislative proposals being considered will provide improvements to the CFPB and some relief to those who are subject to the new regulatory burdens from the Bureau. We look forward to working with the Subcommittee as these provisions move forward in the legislative process.

In particular, NAFCU is glad to see the consideration of Representative Duffy's legislation, the *Bureau Advisory Commission Transparency Act* (H.R. 4262), that would ensure CFPB Credit Union Advisory Council meetings (and others) are open to the public and all minutes and reports are made available as detailed under the *Federal Advisory Committee Act*. We are pleased that, just this week, the CFPB announced that the Bureau was taking the first steps to accomplish this

goal. NAFCU believes the Credit Union Advisory Council plays an important role in informing the CFPB how various rules and regulations would impact credit unions in practice, and encourages the CFPB to take these discussions into account throughout the rule making process.

Again, thank you for holding this important hearing. We look forward to a robust discussion on how the CFPB can operate in a more fair and transparent way. If my colleagues or I can be of assistance to you, or if you have any questions regarding regulatory relief for our nation's credit unions, please feel free to contact myself, or NAFCU's Director of Legislative Affairs, Jillian Pevo at (703) 842-2286.

Sincerely,

Brad Thaler
Vice President of Legislative Affairs

cc: Members of the Subcommittee on Financial Institutions and Consumer Credit

Protect the Rule of Law:
Support H.R. 1844, the Arbitration Fairness Act of 2013

Congress enacted the Federal Arbitration Act (FAA) in 1925 an alternative for businesses on equal footing to resolve disputes in industrial contracts. But today, forced-arbitration agreements bind countless businesses, consumers, and employees before legal disputes even arise. Although often buried within take-it-or-leave-it provisions of adhesive contracts, forced-arbitration agreements also bind consumers through non-obvious connections to transactions, such as text on the side of cereal boxes or the front doors of restaurants. Most Americans do not know that they waive their right to a jury trial by taking a job, eating breakfast, or buying a cell phone.

Forced arbitration erodes the most fundamental legal protections: the right to equal justice and the rule of law. The Seventh Amendment to the U.S. Constitution guarantees each person the right to a jury trial in civil cases. In contrast, forced arbitration is a private system that does not involve juries, juries, or meaningful review. Arbitrators are not required to be lawyers, know the law, or even follow the law in their decisions. Because arbitration is often subject to non-disclosure agreements, future consumers and businesses are deprived of the facts necessary to make meaningful choice in future agreements. This secrecy and lack of accountability also weakens the value of federal and state laws, which lose value without enforcement by the courts. Arbitration also deprives courts of the opportunity to develop or clarify the law, which is especially concerning in areas involving complex or novel civil issues.

There is strong, bipartisan opposition to forced-arbitration agreements. Many commentators on both sides of the aisle have called for an end to forced arbitration. Andrew Cochran, a member of *Tea Party Nation*, writes that "[f]orced arbitration clauses eliminate the ability to hold wrongdoers accountable, even in the most egregious cases involving the abuse of children and the elderly, intentional wrongdoing, and gross violations of law." In *Virginia Right*, a leading Tea Party blog based in Richmond, Virginia, Elwood "Sandy" Sanders argues that forced arbitration agreements are "violative of the spirit of the Constitution" and the "Tea Party needs to rise up and demand essential reform to the arbitration laws." Many progressives echo these concerns. In a letter in support of ending forced-arbitration agreements, a broad coalition of groups, including the American Civil Liberties Union (ACLU), argues that "[f]orced arbitration also weakens the value of federal and state laws intended to protect consumers and employees by removing individuals' ability to enforce those laws in court."

The solution to this problem is H.R. 1844, the Arbitration Fairness Act of 2013. H.R. 1844 does not eliminate arbitration. Instead, it would empower individuals to arbitrate a claim after it arises rather than forcing them into pre-dispute arbitration. Because arbitration can be a fair and effective tool for dispute resolution when parties voluntarily agree to arbitrate following a dispute, this bill applies prospectively to contracts that impose involuntary arbitration on parties. By omitting consumer, civil, and employment agreements from pre-dispute arbitration, this legislation would return the FAA to its original intent.

Please contact Slade Bond at Slade.Bond@mail.house.gov or at 5-6906 to cosponsor this important legislation.

May 20, 2014

The Honorable Shelley Moore Capito
Chair
House Financial Services Subcommittee on Financial Institutions and Consumer Credit
2129 Rayburn House Office Building
Washington, DC 20515

Re: Discussion draft of "Bureau Arbitration Fairness Act"

Dear Chairman Capito and Members of the Subcommittee:

The Fair Arbitration Now coalition writes to strongly oppose draft legislation titled "Bureau Arbitration Fairness Act," offered by Rep. Patrick McHenry that would strip the Consumer Financial Protection Bureau (CFPB) of its ability to prohibit or limit the use of pre-dispute binding mandatory (or forced) arbitration in consumer financial contracts under its jurisdiction.

After the well-documented abuses that led up to the 2008 financial crisis, Congress granted the CFPB the authority to restore consumers' legal rights in the financial services marketplace in the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010. It would be both illogical and an injustice for consumers if Congress suddenly confiscated this crucial authority from the CFPB.

Forced arbitration describes terms hidden in the fine print of financial services contracts that strip consumers of their right to file claims in court. These arbitration clauses, which increasingly also restrict consumers' participation in class actions, result in the funneling of all claims into a secret and biased system controlled by the big banks and lenders. Forced arbitration is presented in take-it-or-leave-it contracts, and individuals have little or no choice unless they forego the products altogether – not realistic when it comes to signing up for student loans, credit cards, and other financial products.

The financial industry uses forced arbitration to avoid accountability. And lenders use these hidden clauses to protect themselves from claims, such as illegal charges and fees on checking or credit card statements, short-term loans with exploding interest rates that violate state and federal consumer protection laws, and other unfair and deceptive lending practices.

Rep. McHenry's legislation is particularly troubling because it is being proposed even after the December 2013 release of the CFPB's preliminary data from an ongoing study on forced arbitration. The CFPB's initial findings demonstrate consumers' preference to have their day in court when they are harmed by financial institutions. The CFPB's data adds to the mountain of evidence proving that forced arbitration not only takes away individuals' legal rights, it also removes a crucial tool, the civil courts, to deter corporations from engaging in illegal and harmful conduct. After it completes the study and releases a final report on forced arbitration, the CPFB should then act in the public's interest and restore consumers' ability to choose how to resolve disputes.

Therefore, we strongly urge you to reject Rep. McHenry's discussion draft--the "Bureau Arbitration Fairness Act." If you have any questions or concerns, please feel free to contact Christine Hines, Public Citizen, (202) 454-5135, chines@citizen.org; Ellen Taverna, National Association of Consumer Advocates, (202) 452-1989, ellen@naca.net; or Julia Duncan, American Association for Justice, (202) 944-2819, Julia.Duncan@justice.org.

Sincerely,

The Fair Arbitration Now Coalition
(To view a list of organizations and individuals that support ending the predatory practice of forced arbitration in consumer and non-bargaining employment contracts, please visit: http://www.fairarbitrationnow.org/content/coalition).

ONE HUNDRED THIRTEENTH CONGRESS

Congress of the United States

House of Representatives

COMMITTEE ON THE JUDICIARY

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May 21, 2014

The Honorable Shelley Moore Capito
Chairman, Subcommittee on Financial Institutions and Consumer Credit
Committee on Financial Services
2129 Rayburn House Office Building
Washington, DC 20515

Dear Chairman Moore Capito and Members of the Subcommittee:

We write in strong opposition to H.R. ____, the "Bureau Arbitration Fairness Act." Rep. Patrick McHenry's draft legislation would eliminate the authority of the Consumer Financial Protection Bureau ("CFPB") to study, prohibit, or limit the use of pre-dispute mandatory arbitration clauses in consumer financial contracts under its jurisdiction. Forced arbitration clauses are pervasive in consumer contracts, depriving countless Americans of fair process and justice every year. That is why we introduced H.R. 1844, the "Arbitration Fairness Act of 2013," legislation that Rep. Hank Johnson has championed since the 110th Congress. Unlike the so-called "Bureau Arbitration Fairness Act," H.R. 1844 would create actual arbitration fairness by preventing the use of forced arbitration clauses in consumer, employment, and antitrust agreements. When the choice of arbitration is post-dispute—and therefore understandable and voluntary—arbitration is a fair process that parties choose willingly. We urge our colleagues to reject Mr. McHenry's draft legislation that would neuter the CFPB's rulemaking authority on this critical matter.

Congress has long observed the harmful impact of forced arbitration clauses. Buried in the fine print of consumer and employment contracts, arbitration clauses harm countless consumers and workers across the country. Congress found that forced arbitration is not only prevalent in financial products and services, but also in other consumer contracts and employment contracts. Congress also found that forced arbitration eliminates incentives for the financial services industry to treat consumers fairly when it knows that there is little chance for public accountability for corporate wrongdoing.

During passage of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 ("Dodd-Frank Act"), Congress specifically enacted Section 1028 authorizing the CFPB to first study the use of forced arbitration, and then prohibit or impose conditions or limitations on the use of forced arbitration agreements in consumer financial products or services. In doing so, Congress determined that forced arbitration was an unfair and deceptive practice that should be

examined and then eliminated. It is therefore alarming and unfortunate that Representative McHenry's draft legislation seeks to remove the CFPB's authority to protect consumers from the predatory practice of forced arbitration before the Bureau even has a chance to fully review the issue.

The Bureau's initial study of forced arbitration clauses in consumer financial services contracts amply demonstrated that these clauses burden consumers. The study found that most large banks use arbitration clauses in their credit card, prepaid cards, and checking account contracts. Additionally, the CFPB determined that over 90 percent of the contracts with arbitration clauses also ban consumers from participating in class action lawsuits. Many class actions involve claims seeking recovery for small-dollar losses, such as illegal fees added to loans, which would be impossible to recover on a case-by-case basis. Because many consumers do not file arbitrations—particularly for small-dollar disputes—this highlights the importance of class action lawsuits for consumer protection.

We are particularly concerned by the effect of these clauses on consumers' legal rights. Allowing these clauses to permeate contracts for consumer financial products and services shrouds corporate misconduct. Enabled by recent U.S. Supreme Court decisions, companies now use forced arbitration clauses to eliminate the ability of consumers to seek collective redress, leaving them without any practical way to vindicate their rights. The rise of forced arbitration clauses has enormous consequences for consumers. It allows businesses to engage in unfair and deceptive practices without fear of consumers privately obtaining relief, including injunctions. These clauses strip individuals of their fundamental constitutional rights and deprive them of a meaningful choice of how to resolve disputes with powerful financial corporations. That is, to avoid these arbitration clauses a consumer would have to forego critical products and services.

Consumers play a critical oversight role in the marketplace because they experience corporate practices firsthand. As such, a consumer's role is not only to seek redress when he or she is injured, but also to hold bad actors publicly accountable. The ability to choose how to resolve disputes with powerful financial corporations will help consumers and the marketplace as a whole. The authority granted to the CFPB by Congress has the ability to incentivize the financial services industry to adopt fair and open practices and to restore consumers' ability to hold wrongdoers accountable.

Forced arbitration also enables companies to violate federal lending laws and well-established federal consumer protections due to the lack of public accountability. As a result, enforcement under the Truth in Lending Act, the Fair Debt Collection Practices Act, the Home Owners Equity Protection Act, the Credit Repair Organizations Act, Fair Credit Reporting Act, the civil provisions of the Racketeer Influenced and Corrupt Organizations Act, and other laws is severely restricted.

The CFPB's authority to restrict this predatory practice is critical to the public interest. Forced arbitration has been an unfortunate factor in consumer contracts for far too long, denying thousands of consumers of their rights and shielding bad business practices.

We therefore urge my colleagues to reject Mr. McHenry's draft legislation.

Thank you for your attention to this important issue. If you have any questions, please contact Slade Bond at Slade.Bond@mail.house.gov or Norberto Salinas at Norberto.Salinas@mail.house.gov or 202-225-6906.

Sincerely,

Hank Johnson

Henry C. "Hank" Johnson, Jr.
Ranking Member
Subcommittee on Regulatory Reform, Commercial and Antitrust Law

John Conyers Jr.

John Conyers, Jr.
Ranking Member

You won't believe your bank's newest fee
Suing your bank? Prepare to pay up
By Catey Hill, MarketWatch

http://www.marketwatch.com/story/suing-your-bank-prepare-to-pay-up-2014-04-09

Thought ATM, overdraft and bounced-check fees were bad? Banks want to fine you for beating them in court.

Most of the roughly 90% of consumers who have a checking account don't read all — or even most — of the fine print when they sign up. And who can blame them? The median length of those disclaimers is a whopping 44 pages — and that doesn't include addenda and some other extraneous documents.

But that's a problem for consumers, as more banks are adding verbiage to their checking account fine print that prevents customers from suing the bank individually or as part of a class-action lawsuit, a study released Wednesday by The Pew Charitable Trusts reveals. What's more, some banks require consumers who pursue a claim against the bank to pay the bank's expenses — regardless of the outcome of the dispute. "This is unfriendly to consumers and forces them to waive legal rights," says Scott Michelman, an attorney with Public Citizen Litigation Group.

Indeed, 70% of banks in 2014 included a so-called mandatory binding arbitration clause in their checking account fine print, up from 58% in 2013. This clause typically requires all disputes you have with the bank to be resolved via arbitration, instead of in front of a judge and jury in court.

"Banks are committed to ensuring customers — and potential customers — are able to understand and compare accounts, said Nessa Feddis, deputy chief counsel for Consumer Protection and Payments, American Bankers Association. "Many banks have voluntarily gone beyond what federal regulations require banks to provide on account terms and have dedicated significant resources to develop additional, consumer-friendly disclosures," Feddis says.

Still, Public Citizen's Michelman says that these clauses are often not consumer friendly for a variety of reasons, including the fact that arbitrators often have an incentive to keep the banks happy, as the banks give them work. And decisions made in arbitration are hard to overturn; and can often deny consumers their right to a jury trial, which might be more sympathetic to their plight than an arbitrator would be. What's more, 66% of banks now include wording that prohibits consumers from joining a class-action lawsuit against the bank, compared with just 54% last year; and roughly one in 10 forbid a consumer from taking the bank to small claims court.

But perhaps the most surprising fine print is the loss, costs and expenses clause. This essentially requires consumers who pursue a claim against a bank to pay the banks' expenses — even if the consumer wins the claim. Roughly one in four banks include this language in their checking account fine print, the study found. "Thinking they have to pay these costs would be an incredible deterrent for many consumers considering entering into a dispute because they might

have to pay costs that exceed the amount of the dispute," says Michelman. "Many wouldn't proceed knowing this."

To be sure, provisions like this aren't all bad for consumers. Alan Kaplinsky, a partner at law firm Ballard Spahr, says avoiding a class-action suit may work in a consumers' favor because they can be time consuming and consumers rarely get a lot of money from them. And he says that many consumers find arbitration easier and less costly than having to deal with a case in court and get positive results. Arbitration, he says, is "a win-win: companies like it because it lowers costs and consumers find it less intimidating." What's more, the loss, costs and expenses clause might not actually be enforced by a bank, as it could result in a rash of bad PR, and courts might not look kindly on language like this, experts say.

Still, many people would like to avoid banks that use this kind of language in their checking account fine print. To that end, we've provided Pew's full list of the best and worst banks when it comes to dispute resolution verbiage (congratulations to Ally Bank, BOKF and Commerce Bank, who were top scorers).

Catey Hill covers personal finance and travel for MarketWatch in New York. Follow her on Twitter @CateyHill.

WASHINGTON TIMES: WHEN MANDATORY ARBITRATION REPLACES LITIGATION, CONSUMERS LOSE

http://communities.washingtontimes.com/neighborhood/leading-edge-legal-advice-everyday-matters/2013/jun/16/when-mandatory-arbitration-replaces-litigation-con/

Sunday, June 16, 2013 - Leading Edge Legal Advice for Everyday Matters by Paul Samakow

WASHINGTON, June 16, 2013 – Legislation that would eliminate required arbitration for employee, consumer and civil rights disputes was proposed last month. It should be passed. Congress must act to restore fairness.

Big business and corporate money, along with a corporate friendly Supreme Court, have been enough in the past to defeat efforts to bring fairness back to the arena of routine consumer and employee rights. Unfortunately, the same thing is likely to happen again, and the Arbitration Fairness Act of 2013 that has been introduced in the House (and a similar bill in the Senate) will likely fail.

As the law exists now, you do not have the right to file a lawsuit for many consumer and employee and civil rights complaints. In these situations, the law requires you to submit to binding arbitration. Binding means no further review, no other options, no going to court.

If the arbitration process were neutral, independent and not connected to corporate purse strings, it might not be so bad. Unfortunately, in most consumer, employment and civil rights cases, the likelihood of the "little guy" prevailing is almost zero.

The existing law of our land, the Federal Arbitration Act, has been interpreted by the pro-big business Supreme Court and thus gives businesses a significant advantage in resolving disputes with us. We are forced into binding arbitration, and the Court says this is legal. Legislation is needed to turn back the clock and restore fairness.

Most contracts we sign with big business today include mandatory arbitration clauses. These include contracts for cell phones, credit cards, mom's or dad's nursing home, and even on-line user agreements. Thus, when presented with these contracts, where the arbitration clauses are in fine print and often in difficult-to-understand legalese, we routinely sign, and thus, we "voluntarily" give up the right to file a lawsuit if there are problems.

The same thing happens in routine employment civil rights matters. Most big business or large corporation employee handbooks state that the employee cannot sue their employers, and that they must submit to a binding arbitration process for almost any issue.

The arbitration process is usually secretive and it is far from independent. Hearings are closed, unlike what you see in courtrooms across America or even on television. There is no appeal or next level review.

Arbitration panels are overwhelmingly funded by big business. Thus, to assure they keep getting the work, arbitrators almost always rule in favor of the business. They understand that decisions against the business will result in their firms not being used again.

When we lose access to the courts, corporations are effectively given a license to steal. Our ability to seek justice in the courts, even when up against the most powerful corporate interests, is an essential part of our democracy.

Questions for the Record

Rep. Keith Ellison

Legislative Proposals to Improve Transparency and Accountability at the CFPB"
Financial Institutions and Consumer Credit Subcommittee
May 21, 2014 2:00 PM in 2128 Rayburn HOB

Questions for Rob Chapman, President, American Land Title Association (ALTA)

1. The National Association of Insurance Commissioners (NAIC) compiles data in three groups: direct premiums, affiliated premiums (which means those premiums generated by entities co-owned by an underwriter) and independent or non-affiliated premiums. It is my understanding that, under the NAIC statistics, independent and non-affiliated premiums **include** premiums for controlled business arrangements. Does ALTA or its members who are involved with RESPRO have any data that can show what percentage of ALTA's membership is defined as affiliated business arrangements versus independent without any affiliation?

The National Association of Insurance Commissioners' (NAIC) definition of affiliated premiums for financial reporting differs from the federal Real Estate Settlement Procedures Act's (RESPA) definition of affiliated business. The NAIC definition focuses on premiums generated by entities partially owned by the insurer while the RESPA definition covers companies partially owned by "a person who is in a position to refer business incident to or a part of a real estate settlement service involving a federally related mortgage loan." ALTA does not possess data showing the percentage of our membership that would qualify as affiliated business arrangements as defined by RESPA. The industry financial data compiled by ALTA is aggregated information reported based on the NAIC's definition of affiliated premiums.

2. In 2007, ALTA's President -- in support of an initiative to get Congress to create a competitors' right of action under RESPA – said that "[m]any of the regulatory bodies lack adequate enforcement resources, and we believe that members of our industry are in the best position to recognize violations among their competitors." When this idea was proposed within your organization, 100 members and the four largest title underwriters who control 90 percent of all business conducted in the United States signed onto the proposal to consent to its aims. Does your organization currently support amending RESPA to create a private competitor's right of action under Section 8 and 9 of RESPA? If not, why not?

When ALTA's president testified in 2007, our membership believed that federal and state regulatory enforcement of RESPA was lacking. Since the time of our testimony, Congress passed the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (Dodd-Frank

Act) which established the Consumer Financial Protection Bureau (CFPB) with enforcement authority over RESPA and other consumer financial laws. Since it has been operational, the CFPB has brought a number of enforcement actions against companies and individuals for violations of RESPA and established procedures for industry whistleblowers, as well as consumers, to report potential violations of RESPA to the CFPB for enforcement. Since the passage of the Dodd-Frank Act, the need for a competitors' private right of action has not been a topic of discussion among our members.

ALTA supports strong and effective regulation and enforcement of RESPA. Punishing bad actors that violate the law helps provide a level playing field for all competitors in the industry and protects consumers. Due to their position in the marketplace, industry participants routinely work with regulators both at the state insurance departments and at the CFPB to report violations of state and federal law.

3. When an affiliation occurs between a referral source such as a lender or real estate firm and a title insurance provider, the title insurance provider provides a percentage of their profit and in some cases their revenue to incent the referral from the referral source. The cost of a referral is therefore a cost of the title insurance provider's business, like the cost of the search or the curative work that is expended by the title professional in clearing title. As an industry, it must follow then that the cost of the referral – like the cost of the search and other core title services – are likewise part of the overall price of the title insurance product. After all, if you pay an employee to perform a search and/or you pay a referral source for their referral of business, the cost of those services must be passed along the supply chain and paid for by the consumer or the agency will fail.

Under RESPA, all real estate settlement service providers are prohibited from paying or accepting, "any fee, kickback, or thing of value pursuant to any agreement or understanding, oral or otherwise, that business incident to or a part of a real estate settlement service involving a federally related mortgage loan shall be referred to any person." This prohibition on the payment or acceptance of referral fees is enforced by the CFPB, state attorneys general and insurance commissioners and consumers, who have a private right of action.

According to RESPA, an affiliated business arrangement is created when a "person who is in a position to refer business incident to or a part of a real estate settlement service" has an ownership interest of more than one percent in the provider of a settlement service. Pursuant to section 8 of RESPA, "the only thing of value" that the co-owner of an affiliated business arrangement can receive, "is a return on the ownership interest or franchise relationship." Additionally, affiliated business arrangements must disclose "the existence of such an arrangement to the person being referred and, in connection with such referral" and inform "such person is not required to use any particular provider of settlement services."

a. Considering the explanation above and the fact that it appears the cost of a referral is part of the overall cost of operating in the title insurance industry, how do you

explain the rising cost of title insurance premiums other than to say that it is caused, in part, by the rising cost of referrals?

According to an analysis of publicly available title insurance premium data from 2003 to 2013, the cost of title insurance has actually decreased 6.20% since 2003[1]. This data is aggregated from analysis of premiums written as reported on Schedule P Part 1 of the NAIC Annual Financial Statements against the amount of insurance written.

4. Do you believe that referral payments have increased the cost of title insurance for American consumers? Why or why not?

As discussed above, consumers' cost of title insurance has decreased over the last decade. In addition, Congress passed RESPA in 1974 to eliminate, "kickbacks or referral fees that tend to increase unnecessarily the costs of certain settlement services." RESPA specifically prohibits the payment of "any fee, kickback, or thing of value pursuant to any agreement or understanding, oral or otherwise, that business incident to or a part of a real estate settlement service involving a federally related mortgage loan shall be referred to any person."

5. Do ALTA's underwriting members configure premium rates based upon the cost of referral payments under affiliated business arrangements? If so, wouldn't the decrease of referral payments help to reduce the overall cost of title insurance premiums and ancillary settlement costs?

Title insurance companies base their rates on an extensive set of actuarial data related to five cost considerations including, (1) maintenance and updating of title information; (2) searching and examining title to the property; (3) clearing defects to title discovered during the search and examination when possible; (4) paying losses for covered title claims which includes sufficiently reserving to pay future claims; and (5) allowing for a reasonable return on capital. These expenses differ from state to state and locality to locality based on the cost, claims and revenue experiences of local title agents and companies operating in that region. By statute, title insurance prices cannot be excessive, inadequate or unfairly discriminatory. Rates are based upon the size of the transaction.

6. What does the consumer actually "receive" for the referral payment made between an affiliated title provider and a referral source?

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[1] 2013 Year-End Title Insurance Industry Financial Statement, American Land Title Association. Available at http://www.alta.org/industry/financial.cfm#sthash.KmkG6xNt.dpuf

As noted above, RESPA prohibits the payment or acceptance of, "any fee, kickback, or thing of value pursuant to any agreement or understanding, oral or otherwise, that business incident to or a part of a real estate settlement service involving a federally related mortgage loan shall be referred to any person." Moreover, under RESPA, the only thing of value that a "person who is in a position to refer business incident to or a part of a real estate settlement service" receives pursuant to their ownership interest in an affiliated business arrangement is a return on the ownership interest or franchise relationship in the affiliated business arrangement.

7. It is alleged that some brokers and lenders pay their managers bonuses based on how much title business their offices capture.

    a. Do you know how common this practice of paying managers bonuses based on capture rate is?

We are not aware of any specific policies by brokers or lenders to pay their employees and managers bonuses based on how much title business their office captures. It is worth noting again that we support the CFPB efforts to bring enforcement actions against companies that violate RESPA. We also encourage the CFPB to remind companies about permissible practices under RESPA so that they can ensure robust compliance with the law.

We also strongly encourage consumers to exercise their right to shop for their title insurance provider. To help consumers exercise their right to shop, the industry has taken a number of steps to help consumers learn more about title insurance and shop for title insurance. In particular, the industry created www.homeclosing101.org, which is designed to help consumers navigate the home buying process and identify local title and settlement companies with whom they can shop.

    b. It is my understanding that the managers who receive these bonuses are also responsible for supervising real estate agents. The managers are responsible for setting their commission splits between the agent and the company. Do you have concerns that this type of compensation formula could lead to agents steering clients to their in-house title company instead of shopping and comparing title companies on behalf of their clients?

We recognize that illegal steering activities hurt a consumer's ability to shop for a title insurance provider and strongly encourage our members to constantly review their practices to ensure they comply with legal requirements. We also encourage our members to report violations of RESPA through the CFPB's whistleblower program and state insurance departments.

8. If a builder is financially distressed and its title company uncovers title defects directly related to the builder (unpaid mechanics liens, tax liens, etc...), what protections exist to prevent the builder from interfering with its own title company's decision not to close a file?

This is part of the value of title insurance. Title insurance provides indemnity against defects in or liens or encumbrances on the title to real property. This includes unpaid mechanics liens and tax liens which were not discovered and excepted to during the title search or paid off at closing. This valuable protection that both the consumer and the lender receive when they obtain a title insurance policy means that the title insurer will indemnify them for any loss covered by an unpaid lien and cover the cost of defending the consumer's interest all at no additional cost.

To help manage this risk, each title insurer sets its own individual underwriting standards. When a title insurer contracts with an agent (including a builder-owned agent), the title insurer requires the agent to follow these standards when the agent prepares and issues a title insurance policy. Insurers also periodically audit an agent's files and practices to determine whether the agent adheres to the insurer's underwriting standards and may cancel the agent if they discover the agent is not following the insurer's standards.

9. Many title companies are owned by lawyers who refer their clients to their in-house title companies. Do you have members in that category? If so, how is it possible for a lawyer to negotiate insurance coverage on behalf of his client if the attorney is the title agent? In other words, isn't the attorney negotiating against him or herself?

Individual attorneys and attorney title agencies make up a sizable portion of the ALTA membership. In some states, issuing a title insurance policy, rendering an opinion of title or conducting a real estate settlement is the practice of law and can only be performed by a licensed attorney.

Attorneys must perform their duties in accordance with their applicable rules of professional conduct. In some states the rules of conduct may allow an attorney to take a dual role in real estate transactions (an example includes representing one party to the transaction while writing the title insurance policy for another). The American Bar Association (ABA) in Formal Opinions 331 (Comm. on Ethics and Professional Responsibility, 1972) and 304 (1961) opined that under its model rules of professional conduct, an attorney can work for a buyer or seller and the title company in a real estate transaction if the attorney can adequately represent the client and the title company and both parties consent after full disclosure. Some state bar associations (Illinois) have similar opinions while others (New York) prohibit this dual representation.

Edmund Mierzwinski, U.S. PIRG (202-461-3821 or edm (AT) pirg.org)

Response to Questions for the Record

Rep. Keith Ellison

Legislative Proposals to Improve Transparency and Accountability at the CFPB"
Financial Institutions and Consumer Credit Subcommittee
May 21, 2014 2:00 PM in 2128 Rayburn HOB

1. **Are there disparities in the compensation and access to redress between consumers who are limited to arbitration and those that participate in class action lawsuits? Please describe the differences in compensation for harm.**

Yes. It is a well-known problem that there is a massive disparity between compensation for consumers who attempt to use the closed, non-transparent private arbitration "system" for redress and those fortunate enough to band together to participate in class action lawsuits. The vast gulf in compensation was most recently confirmed by the preliminary results of the CFPB's arbitration study released in December 2013.[1] The myriad problems with the private arbitration system –from its cost to its repeat player syndrome benefiting special interests, from its non-transparent processes (including a lack of records), to its finality (lack of an appeal process) even in the face of legal errors by the arbiter are well-documented by others.[2]

Highlights of the CFPB's Findings:

- The total number of consumer arbitrations is very, very small. The CFPB looked for all the credit card, checking, and payday loan disputes filed by consumers with the American Arbitration Association (AAA) over the three year period 2010-2012 and found approximately 900 claims.[3] Despite the pervasiveness of forced arbitration clauses, that means that, across the entire country, only around 300 consumers pursue

[1] http://files.consumerfinance.gov/f/201312_cfpb_arbitration-study-preliminary-results.pdf
[2] See this National Association of Consumer Advocates Fact Sheet http://www.naca.net/issues/forced-arbitration
[3] CFPB Arbitration Study Preliminary Results, Section 2 "Summary of results to date" ("From 2010 through 2012, there was an annual average of 415 individual AAA cases filed for four product markets combined: credit card, checking account, payday loans, and prepaid cards. The annual average was 344 credit card arbitration filings, 24 checking account arbitration filings, 46 payday loan arbitration filings, and one prepaid arbitration filing. These numbers do not indicate the number of cases in which the filing was 'perfected' and the matter proceeded to arbitration. They indicate only the number of filings, deficient or otherwise. Not all these arbitration filings were made by consumers. For the three product markets combined, the standard AAA 'claim form' records consumers filing an average of under 300 cases each year."). Although CFPB only looked at AAA, there is reason to believe the numbers are miniscule even if other arbitration companies are included. See CFPB Arbitration Study Preliminary Results, Section 4.1.1 ("JAMS, the other leading consumer arbitration administrator, has reported that it handles 'at most' a few hundred consumer cases every year.").

arbitration against their financial services providers each year. The total amount in dispute in the arbitrations examined was only $15 million.[4]

- Conversely, CFPB notes that the result of just ***eight class action litigations*** was financial relief for ***more than 13 million people***. CFPB wrote: "More than 13 million class members made claims or received payments under these settlements. Total payments or debt relief to the classes are in excess of $350 million, exclusive of attorneys' fees and the value of injunctive relief." Section 4.8.2 "Class disputes."

2. Which is more likely to compensate victims from small dollar damages such as overcharges like mis-ordering payments to run up overdraft fees -- mandatory arbitration or class action lawsuits?

By far, class action lawsuits help consumers with small dollar damages more. Forced arbitration, while touted as "cheaper," "better, or "faster" is actually not a real remedy, it is a legerdemain used by powerful special interests to deny consumers redress, whether in the form of injunctive relief against onerous practices or as restitution for victims of such practices. Forced arbitration clauses also perpetuate corporate wrongdoing; why should a corporate wrongdoer comply with the law if it knows it is immune from the courthouse?

As the CFPB report describes, while it is routine that payday lenders often charge interest above what is legally allowed,[5] only 11 people brought arbitration claims for charging of interest/fees above a state payday loan cap.[6] Were the CFPB to review litigation challenging

[4] CFPB Arbitration Study Preliminary Results, Section 4.4.3 "Data" ("Figure 14 shows the consumer claim form amount in all cases in which we could identify a claim form amount but could not identify a disputed debt amount. Across these 326 cases, the average consumer claim amount was $38,726, and the median was $11,805. Overall, we identified just under $15 million in claim form amounts in these cases for these product markets over this period.").

[5] See, e.g., Press Release, NY AG, A.G. Schneiderman Announces Settlements With Five Companies That Collected On Illegal Payday Loans (Sept. 30, 2013) ("These interest rates far exceed the maximum rate allowed under New York law, which is limited to 16 percent for most lenders not licensed by the state."); Press Release, Ariz. AG, Goddard to Aggressively Enforce Payday Loan Ban with 'Operation Sunset' (June 9, 2010) ("Goddard noted that other states, such as North Carolina and Arkansas, have seen deceptive practices following changes in their laws that ended payday loans. Auto loans, pre-paid debit cards and Internet payday lending are alternatives used by the payday loan industry elsewhere to evade the law. For example, pre-paid debit cards have been offered with an interest rate and fees that would exceed Arizona's annual percentage rate limit of 36 percent."); Kate Cox, CashCall Tries To Collect On Illegal Payday Loans, CFPB Says "Nice Try", Consumerist (Dec. 17, 2013) ("A lawsuit the CFPB filed yesterday alleges that online lender CashCall, its subsidiary WS Funding Inc, and its affiliate Delbert Services Corporation, violated the laws of at least eight separate states.").

[6] Consumer Financial Protection Bureau, "Arbitration Study Preliminary Results," see Figure 24 (payday loans), showing that 8% of arbitration cases were brought for charging interest/fees above state cap. This is 11 people out of 137.

the charging of such illegal rates, it would likely find class actions that provided relief to thousands.[7]

Further, this stark differential in consumer benefits is demonstrated by an example I made in my testimony[8] to the committee. A number of successful class actions have been filed against banks to stop the practice of check re-ordering to maximize overdraft revenue and to get refunds for customers overcharged. One judge held that the practice was "unfair and fraudulent." Ultimately these cases settled with the result being tens of millions of dollars of restitution for Americans who had been cheated. The Bureau, in part one of its required study, examined three of these cases and found that they provided relief to over six million people for abuses in the ordering/timing of overdraft charges. The financial relief provided was more than $120 million. The Bureau also looked at all the consumer arbitrations filed against banks with the American Arbitration Association over a three year period 2010-2012. **During that three year period, only two people brought individual arbitration claims for overdraft ordering/timing.**[9]

I am unaware of any consumer advocate who does not consider forced arbitration to be a rigged system designed to benefit repeat players at the expense of consumers.

Rigged system? I am sure you are aware of the significant legal action brought by your own state's attorney general, Lori Swanson, against the National Arbitration Forum in 2009 and implicating some of the nation's largest credit card companies.[10]

The National Arbitration Forum was alleged by General Swanson not to be an independent arbiter. In fact, her investigation described it as a captive unit of a New York hedge fund acting in concert with a web of debt collectors with a simple business model: seeking to increase the hedge fund's revenue. The settlement caused NAF to permanently leave consumer arbitration and several large credit card companies that had been exclusively availing themselves of its services to enter into 3-4 year consent decrees temporarily eliminating their own use of arbitration. Rigged indeed.

3. Do consumers choose mandatory arbitration or is mandatory arbitration forced upon them?

Mandatory arbitration is absolutely forced on consumers. The clauses are buried deep in a variety of boilerplate (non-negotiable, take-it-or-leave-it) contracts of adhesion required to open

[7] For example, just one class action in Indiana court provided relief to more than 6,000 individuals charged interest in excess of what is allowed under Indiana state law. *Edwards v. Geneva-Roth Capital Inc.*, No. 49C01-1003-PL-013084 (Marion Co., Circuit Ct., Ind.).

[8] At pages 7-8, 21 May 2014, available at http://financialservices.house.gov/UploadedFiles/HHRG-113-BA15-WState-EMierzwinski-20140521.pdf

[9] See CFPB Arbitration Study Preliminary Results, discussion of "In Re Checking Account Overdraft Litigation," at Section 4.8.2, pages 108-110.

[10] A good summary can be found in a story by Robert Berner in Business Week, "Big Arbitration Firm Pulls Out of Credit Card Business," 19 July 2009, available at http://www.businessweek.com/investing/wall_street_news_blog/archives/2009/07/big_arbitration.html

bank accounts or accept a variety of other services, even including to obtain a payday loan or a copy of your credit report online.

Worse, court jurisprudence has broadened the impact of forced arbitration clauses at the expense of consumer legal rights and access to justice. In *Concepcion*, the Supreme Court held that language in the small print of the clauses overrides state law bans on class action waivers. In a later case, *Italian Colors*, the Court expanded this holding by upholding the requirements of a forced arbitration clause even in a circumstance where the only possible effective vindication for the victims would be a class action lawsuit.

As pointed out in a recent report[11] by the National Association of Consumer Advocates and Public Citizen, the impact of these cases has been devastating for consumers, employees and small businesses:

> When the U.S. Supreme Court first issued the *AT&T Mobility v. Concepcion* decision three years ago, the authors of this report predicted devastating consequences for American consumers and workers. Together with *American Express Co. v. Italian Colors Restaurant*, the evidence is now unmistakable. Concepcion, American Express and other recent decisions have slammed a wrecking ball through the landscape of consumers' and employees' right to seek redress when they are harmed by corporations. [...]
>
> Preliminary data released by the Consumer Financial Protection Bureau (the Bureau or CFPB) data from the Bureau's preliminary findings confirmed a high prevalence of arbitration clauses in the terms of credit cards, checking accounts and prepaid cards. Additionally, nearly all of the arbitration clauses (about 90 percent) contained terms denying their customers the ability to participate in class actions.
>
> The CFPB data also confirmed that consumers rarely go to arbitration for small-dollar disputes, which highlights the importance of class actions that often involved claims seeking recovery for small-dollar claims. When an individual arbitration is the only path available for consumers and workers, thousands of valid claims likely go unheard in *any* forum, whether in court or arbitration, as the CFPB data indicates.
>
> The CFPB's preliminary data supports what we already know to be true; forced arbitration blocks opportunities for consumers and employees to seek redress in court. The presence of forced arbitration clauses in contracts means that many serious violations of law will go undetected, either because cases will never be brought or because the evidence presented and decisions rendered in private arbitration proceedings are not made public.[12]

[11] See Christine Hines and Ellen Taverna, "Cases That Would Have Been: Three Years After AT&T Mobility v. Concepcion, Claims of Corporate Wrongdoing Continue to Pile Up," Public Citizen and National Association of Consumer Advocates, April 2014, available at http://www.naca.net/news/cases-would-have-been-three-years-after-att-mobility-v-concepcion

[12] See page 13, http://www.naca.net/news/cases-would-have-been-three-years-after-att-mobility-v-concepcion

While no consumer advocate supports the use of pre-dispute forced arbitration clauses in boilerplate contracts, no consumer advocate would oppose the notion of consumers voluntarily and deliberately choosing to arbitrate a claim only **after** a dispute has arisen.

The best hope to restore balance to the scales of justice is either for the CFPB to ban forced arbitration after completing the mandated study and report to Congress or for Congress to enact the actual Arbitration Fairness Act, HR 1844.

4. If the Civil Penalties Fund is eliminated as proposed by H.R. 3389, would consumers harmed by fraudulent practices receive less compensation? Please explain why their options to recover damages could be hindered.

Although HR 3389 was modified in markup to retain the Civil Penalty Fund, it is possible that it could be modified again, for example, by floor amendment, to achieve its original effect of completely eliminating the Fund. Vigilance is needed.

If the Fund were completely eliminated, there would be little hope for the victims of bankrupt scammers to obtain restitution. This regressive outcome would tend to harm lower-income victims of last-dollar scams, such as foreclosure rescue or debt settlement companies. These consumer victims were probably already suffering from financial losses, perhaps due to the lingering recession triggered by reckless Wall Street and other financial firm practices, that had caused them to consider the services of the scammer in the first place.

Conversely, customers of larger, non-destitute corporate wrongdoers, such as victims of unfair practices by big credit card companies, would not be affected. These consumers are more likely to be more affluent. But, were the worst version of the bill, eliminating the Civil Penalty Fund, to go forward, they would not be at risk of losing their restitution, because it would continue to come directly from the wrongdoer. This highly regressive result is one critical reason that we strenuously oppose the original version of HR 3389. The important Civil Penalty Fund must not be eliminated.

Nevertheless, we remain disappointed that a majority of the committee voted to eliminate the Bureau's discretion to retain and direct any excess civil penalty funds to other important remedial purposes, such as establishing financial literacy programs for the widows and widowers of veterans. It is entirely appropriate for an agency itself established for remedial purposes -- essentially to right wrongs caused by reckless activities condoned in a then-unregulated financial system -- to use its expertise to determine better, more efficient ways to right wrongs. For more information about the Civil Penalty Fund and its primary and secondary uses,[13] see this page, which also links to detailed FAQs.[14]

[13] http://www.consumerfinance.gov/budget/civil-penalty-fund/
[14] http://www.consumerfinance.gov/f/201406_cfpb_faqs_cpf.pdf

AMERICANS
FOR FINANCIAL REFORM
ACCOUNTABILITY • FAIRNESS • SECURITY

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May 21, 2014

Dear Representative:

On behalf of Americans for Financial Reform, we are writing to express our serious concerns about the bills and proposals being discussed in today's hearing, misleadingly titled "Legislative Proposals to Improve Transparency and Accountability at the CFPB." The measures under discussion would weaken the Consumer Financial Protection Bureau (CFPB) and make it harder for the agency to do its job.

The CFPB was established by the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, and opened its doors as the nation's only financial regulator completely devoted to consumer protection in July 2011. Since then, the CFPB has been protecting consumers by ensuring that markets work in an open, transparent, and fair way. The Bureau's mission is to hold financial companies accountable for being up front about the costs of, and risks associated with, their products, and also to ensure that consumers are treated with dignity and respect, rather than set up to fail. The Bureau has successfully gone to bat for consumers, delivering results that are making markets work more fairly and putting a stop to fraud and abuse.

The proposals being considered today will not protect the public or increase accountability appropriately; instead they are part of a continuing pattern of mischaracterizing the CFPB's organization and processes. These proposals would hobble the agency and interfere with its ability to fulfill its mission. Unfortunately, opponents of consumer protection—including portions of the financial services industry that opposed the creation of the Bureau, have opposed its consumer protection efforts at every step, and possess a narrow self-interest in preventing effective consumer regulation—seem now to be pursuing a strategy of 'death by a thousand cuts.' Because more transparent efforts to gut the Bureau have failed, opponents have now turned to a series of procedural maneuvers that they hope will weaken it over time. In addition to these more procedural efforts, the package of legislation to be considered also includes a frontal attack on the Bureau's authority to consider the impact of forced arbitration clauses on consumers. The bills, described in the summary below, represent the latest in a continuing effort to tie the agency's hands, and we urge you to oppose them.

- The "Bureau Arbitration Fairness Act" would completely repeal the CFPB's authority to ban or regulate the use of arbitration provisions in contracts for consumer financial products or services. Forced arbitration clauses eliminate consumers' access to courts, instead forcing them into a rigged and secretive system to settle disputes. The Dodd-

Frank Act required the CFPB to conduct a study on the use of forced arbitration; the preliminary data released by the agency showed that the prevalence of forced arbitration clauses and class-action bans provide corporations with a license to break the law. Repealing the agency's authority to restrict the practice of forced arbitration provisions would weaken consumers' ability to hold wrongdoers accountable.

- H.R. 4262, the "Bureau Advisory Commission Transparency Act," would apply the provisions of the Federal Advisory Committee Act (FACA) to the CFPB, which would require that advisory committee meetings all be made public. The CFPB has already implemented much of the FACA voluntarily, and recently the CFPB increased its longstanding substantial conformance with the FACA further, announcing changes to the format of its Board and Council meetings. It is important, however, that the agency retain the flexibility to determine when information is preliminary; for example, this bill could have the unintended consequence of creating a disincentive for Academic Research Council researchers and academics to share preliminary data and methodologies with each other. It is also worth noting that the FACA currently does not apply to a number of agencies beyond the CFPB, including the Federal Reserve, the Advisory Commission on Intergovernmental Relations, the Commission on Government Procurement, the National Academy of Sciences, and the National Academy of Public Administration.

- H.R. 4383, the "Bureau of Consumer Financial Protection Small Business Advisory Board Act," would establish a Small Business Advisory Board to meet at least twice a year, comprised of at least twelve representatives of the small business community. This proposal is unnecessary and duplicative because the CFPB is already specifically—and to a greater extent than most other regulatory agencies—required to take small business concerns into account when issuing rules. Small business representatives already have a unique first look at CFPB rules under Section 1100G of the Dodd-Frank Act, which requires the CFPB to convene a small business review panel and collect advice and recommendations from representatives of small entities on potential economic impacts of proposed rules under consideration, and to report on their review.

- H.R. 4539, the "Bureau Research Transparency Act," would require that research papers the Bureau makes available to the public be accompanied by all related studies, data, and analyses. This bill would burden staff with demands that would be impractical to comply with, could force the CFPB to release trade secrets or other materials specifically protected by contracts with companies providing data, and could potentially require the release of confidential supervisory information. Alternatively, this bill could prevent the CFPB from using or collecting the data it needs to understand markets and make wise regulatory decisions. With regard to concerns about data integrity, the Data Quality Act already provides safeguards, making further requirements unnecessary.

- H.R. 4604, the "CFPB Data Collection Security Act," would require an opt-out list for consumers who do not want the CFPB to collect personally identifiable information (PII) about them. This bill is unnecessary and misleading, as the CFPB does not collect PII, unless it is voluntarily provided with affirmative consent. The Bureau collects much of its information from commercial vendors, in which PII is not included. Furthermore, the

CFPB already protects consumer privacy, both when consumers submit PII and when the agency studies datasets that do not include PII.

- H.R. 3389, the "CFPB Slush Fund Elimination Act of 2013," would eliminate the Bureau's Civil Penalty Fund, instead directing the Federal Reserve to transfer existing funds and future penalties to the Treasury. The CFPB's Civil Penalty Fund is based on a rulemaking, and its activities are both narrow and statutorily based. The fund is intended to help consumers who have been harmed. One use has been to provide remediation to consumers when the company that defrauded them is insolvent. A secondary use of funds is for financial literacy, a task given to the CFPB by Congress. This bill would make it harder for the CFPB to protect vulnerable and targeted populations, and would weaken the agency's work on financial literacy issues.

- H.R. 3770, the "CFPB-IG Act of 2013," would create a separate, independent inspector general (IG) for the CFPB and would require the IG to appear at semi-annual hearings of the House Financial Services Committee and the Senate Banking Committee. This legislation is unnecessary because the CBPB already has an IG, shared with the Federal Reserve, within which the CFPB is housed: the Dodd-Frank Act of 2010 established that the Federal Reserve's Office of Inspector General has oversight authority for Bureau, conducting audits, investigations, and other necessary reviews. We have seen no evidence that the existing structure is inadequate, and are concerned that this bill is designed simply to convey the message that the Bureau lacks oversight, when in fact proper oversight systems are in place.

- H.R. 4662, the "Bureau Advisory Opinion Act," would establish a process by which covered persons can submit inquiries concerning the conformance of prospective products and services with consumer financial law, and must then receive a confidential opinion from the Director. While some agencies do provide limited advisory committee processes in limited circumstances, this bill would create an unprecedented and impractical procedural requirement—one that is not imposed anywhere else in the government.

- The "Bureau Guidance Transparency Act" would require the CFPB to provide a public notice and comment period before issuing any guidance in final form. It also would require that the Bureau make public any studies, data, and analyses it relied upon for preparing and issuing the guidance. Guidances are not currently subject to the Administrative Procedures Act (APA), so this bill would radically revise the APA with regard to the CFPB alone. A guidance is intended to provide regulated entities with clarity on the regulator's expectation with regard to existing laws: attaching a notice and comment period would hinder the CFPB's ability to make compliance expectations clear to market participants, and to act in a timely way to facilitate compliance with the law.

- The "Preventing Regulatory Abuse Act of 2014" would require the CFPB to go through a formal rulemaking in order to publish a final rule that gives guidance on the agency's definition of an "abusive" act or practice; would enact a moratorium on any enforcement action using the CFPB's "abusive" authority until the final rule is published; and would

repeal the CFPB's authority to prohibit "abusive" acts or practices if it fails to conform to specified rulemaking timelines. In fact, the Dodd-Frank Act already provides parameters as to what constitutes an "abusive" practice. And because 'abusive'-- like 'unfair' and 'deceptive' – is a fact-specific concept designed to be flexible to reach unknown future abuses, it would be impractical to construct a rule that could effectively apply to all industries and possible circumstances of abuse. . In addition, this bill imposes timelines that would not be realistic for agency staff to meet. Enacting this proposal would hurt the Bureau's ability to fulfill its mission.

- The "Bureau Examination Fairness Act" would prohibit the CFPB from including enforcement attorneys in examinations, regulate data requests, and place time limitations on the completion of examination field work and the issuance of exam reports. This bill is somewhat redundant as the CFPB has already removed enforcement attorneys from examination practices. This bill would, however, ban this practice absolutely. An effective supervision and enforcement benefit would include the flexibility to call an experienced attorney if necessary. Furthermore, the bill would impose a number of requirements on the Bureau regarding coordination, data sampling, and cost benefit requirements. This bill's restrictions on the length of examinations and its limits on the costs of data collection would harm the CFPB's ability to conduct necessary and adequate supervision.

The bills before the committee today are message pieces in a campaign to portray the CFPB as a too-powerful agency that threatens consumer freedom and privacy. We have not seen any evidence that this is the case. What we see is an agency seriously and responsibly doing the job Congress gave it: making consumer financial markets fairer and more transparent; putting money back in the pockets of members of the public who were fleeced by illegal conduct, and policing rules of the road that make the financial system work better for responsible businesses and responsible consumers alike. Obstructing reasonable regulation only serves the interests of the worst elements of the financial industry, and encourages law breaking. We urge the committee to use its time to explore ways to move forward on making sure that the U.S. financial system supports people's ability to save, transact, and borrow prudently.

Sincerely,

Americans for Financial Reform
Center for Economic Justice
Consumer Action
Consumers Union
National Association of Consumer Advocates
National Consumer League
U.S. PIRG
Woodstock Institute

Following are the partners of Americans for Financial Reform.

All the organizations support the overall principles of AFR and are working for an accountable, fair and secure financial system. Not all of these organizations work on all of the issues covered by the coalition or have signed on to every statement.

- AARP
- A New Way Forward
- AFL-CIO
- AFSCME
- Alliance For Justice
- American Income Life Insurance
- American Sustainable Business Council
- Americans for Democratic Action, Inc
- Americans United for Change
- Campaign for America's Future
- Campaign Money
- Center for Digital Democracy
- Center for Economic and Policy Research
- Center for Economic Progress
- Center for Media and Democracy
- Center for Responsible Lending
- Center for Justice and Democracy
- Center of Concern
- Center for Effective Government
- Change to Win
- Clean Yield Asset Management
- Coastal Enterprises Inc.
- Color of Change
- Common Cause
- Communications Workers of America
- Community Development Transportation Lending Services
- Consumer Action
- Consumer Association Council
- Consumers for Auto Safety and Reliability
- Consumer Federation of America
- Consumer Watchdog
- Consumers Union
- Corporation for Enterprise Development
- CREDO Mobile
- CTW Investment Group
- Demos
- Economic Policy Institute
- Essential Action
- Green America
- Greenlining Institute
- Good Business International

- HNMA Funding Company
- Home Actions
- Housing Counseling Services
- Home Defender's League
- Information Press
- Institute for Agriculture and Trade Policy
- Institute for Global Communications
- Institute for Policy Studies: Global Economy Project
- International Brotherhood of Teamsters
- Institute of Women's Policy Research
- Krull & Company
- Laborers' International Union of North America
- Lawyers' Committee for Civil Rights Under Law
- Main Street Alliance
- Move On
- NAACP
- NASCAT
- National Association of Consumer Advocates
- National Association of Neighborhoods
- National Community Reinvestment Coalition
- National Consumer Law Center (on behalf of its low-income clients)
- National Consumers League
- National Council of La Raza
- National Council of Women's Organizations
- National Fair Housing Alliance
- National Federation of Community Development Credit Unions
- National Housing Resource Center
- National Housing Trust
- National Housing Trust Community Development Fund
- National NeighborWorks Association
- National Nurses United
- National People's Action
- National Urban League
- Next Step
- OpenTheGovernment.org
- Opportunity Finance Network
- Partners for the Common Good
- PICO National Network
- Progress Now Action
- Progressive States Network
- Poverty and Race Research Action Council
- Public Citizen
- Sargent Shriver Center on Poverty Law
- SEIU
- State Voices
- Taxpayer's for Common Sense
- The Association for Housing and Neighborhood Development
- The Fuel Savers Club

- The Leadership Conference on Civil and Human Rights
- The Seminal
- TICAS
- U.S. Public Interest Research Group
- UNITE HERE
- United Food and Commercial Workers
- United States Student Association
- USAction
- Veris Wealth Partners
- Western States Center
- We the People Now
- Woodstock Institute
- World Privacy Forum
- UNET
- Union Plus
- Unitarian Universalist for a Just Economic Community

List of State and Local Partners

- Alaska PIRG
- Arizona PIRG
- Arizona Advocacy Network
- Arizonans For Responsible Lending
- Association for Neighborhood and Housing Development NY
- Audubon Partnership for Economic Development LDC, New York NY
- BAC Funding Consortium Inc., Miami FL
- Beech Capital Venture Corporation, Philadelphia PA
- California PIRG
- California Reinvestment Coalition
- Century Housing Corporation, Culver City CA
- CHANGER NY
- Chautauqua Home Rehabilitation and Improvement Corporation (NY)
- Chicago Community Loan Fund, Chicago IL
- Chicago Community Ventures, Chicago IL
- Chicago Consumer Coalition
- Citizen Potawatomi CDC, Shawnee OK
- Colorado PIRG
- Coalition on Homeless Housing in Ohio
- Community Capital Fund, Bridgeport CT
- Community Capital of Maryland, Baltimore MD
- Community Development Financial Institution of the Tohono O'odham Nation, Sells AZ
- Community Redevelopment Loan and Investment Fund, Atlanta GA
- Community Reinvestment Association of North Carolina
- Community Resource Group, Fayetteville A
- Connecticut PIRG
- Consumer Assistance Council
- Cooper Square Committee (NYC)
- Cooperative Fund of New England, Wilmington NC

- Corporacion de Desarrollo Economico de Ceiba, Ceiba PR
- Delta Foundation, Inc., Greenville MS
- Economic Opportunity Fund (EOF), Philadelphia PA
- Empire Justice Center NY
- Empowering and Strengthening Ohio's People (ESOP), Cleveland OH
- Enterprises, Inc., Berea KY
- Fair Housing Contact Service OH
- Federation of Appalachian Housing
- Fitness and Praise Youth Development, Inc., Baton Rouge LA
- Florida Consumer Action Network
- Florida PIRG
- Funding Partners for Housing Solutions, Ft. Collins CO
- Georgia PIRG
- Grow Iowa Foundation, Greenfield IA
- Homewise, Inc., Santa Fe NM
- Idaho Nevada CDFI, Pocatello ID
- Idaho Chapter, National Association of Social Workers
- Illinois PIRG
- Impact Capital, Seattle WA
- Indiana PIRG
- Iowa PIRG
- Iowa Citizens for Community Improvement
- JobStart Chautauqua, Inc., Mayville NY
- La Casa Federal Credit Union, Newark NJ
- Low Income Investment Fund, San Francisco CA
- Long Island Housing Services NY
- MaineStream Finance, Bangor ME
- Maryland PIRG
- Massachusetts Consumers' Coalition
- MASSPIRG
- Massachusetts Fair Housing Center
- Michigan PIRG
- Midland Community Development Corporation, Midland TX
- Midwest Minnesota Community Development Corporation, Detroit Lakes MN
- Mile High Community Loan Fund, Denver CO
- Missouri PIRG
- Mortgage Recovery Service Center of L.A.
- Montana Community Development Corporation, Missoula MT
- Montana PIRG
- New Economy Project
- New Hampshire PIRG
- New Jersey Community Capital, Trenton NJ
- New Jersey Citizen Action
- New Jersey PIRG
- New Mexico PIRG
- New York PIRG
- New York City Aids Housing Network
- New Yorkers for Responsible Lending

- NOAH Community Development Fund, Inc., Boston MA
- Nonprofit Finance Fund, New York NY
- Nonprofits Assistance Fund, Minneapolis M
- North Carolina PIRG
- Northside Community Development Fund, Pittsburgh PA
- Ohio Capital Corporation for Housing, Columbus OH
- Ohio PIRG
- OligarchyUSA
- Oregon State PIRG
- Our Oregon
- PennPIRG
- Piedmont Housing Alliance, Charlottesville VA
- Michigan PIRG
- Rocky Mountain Peace and Justice Center, CO
- Rhode Island PIRG
- Rural Community Assistance Corporation, West Sacramento CA
- Rural Organizing Project OR
- San Francisco Municipal Transportation Authority
- Seattle Economic Development Fund
- Community Capital Development
- TexPIRG
- The Fair Housing Council of Central New York
- The Loan Fund, Albuquerque NM
- Third Reconstruction Institute NC
- Vermont PIRG
- Village Capital Corporation, Cleveland OH
- Virginia Citizens Consumer Council
- Virginia Poverty Law Center
- War on Poverty - Florida
- WashPIRG
- Westchester Residential Opportunities Inc.
- Wigamig Owners Loan Fund, Inc., Lac du Flambeau WI
- WISPIRG

Small Businesses

- Blu
- Bowden-Gill Environmental
- Community MedPAC
- Diversified Environmental Planning
- Hayden & Craig, PLLC
- Mid City Animal Hospital, Pheonix AZ
- UNET

"Legislative Proposals to Improve Transparency and Accountability at the CFPB"

Questions for the Record Submitted by Representative Keith Ellison May 21, 2014

Questions for Andrew Pincus

1. **In your oral testimony you mentioned a study, *Do Class Actions Benefit Class Members?*, published in December 2013 by your law firm Mayer Brown LLP that examined class action resolutions. According to the study, the analysis was based on a set of 148 federal court class actions. Please identify and list all 148 class actions, by (1) case name, (2) case number, (3) name of court, (4) and case citation, if any.**

To address the prevailing debate about class actions—which has relied upon competing anecdotes—my law firm conducted an empirical analysis of class actions, which is attached as Exhibit 1 to this submission.

Exhibit 2 to this submission includes a list of each case we examined, including the case caption, docket number, and court. Because the study evaluated the filings on each case's docket using the federal courts' Public Access to Court Electronic Records ("PACER") system, and not through the opinion reporting system, we did not collect case citations for the set of class actions that we examined.

The findings of our study of 148 class actions cast significant doubt on the extent to which class actions actually deliver benefits to class members:

- For the entire data set, during the time frame studied, ***not one of the class actions ended in a final judgment on the merits for the plaintiffs.*** And none of the class actions went to trial, either before a judge or a jury.
- The vast majority of cases produced ***no benefits to most members of the putative class***—even though in a number of those cases the lawyers who sought to represent the class often enriched themselves in the process (and the lawyers representing the defendants always did).
    - ***Approximately 14 percent of all class action cases remained pending four years after they were filed***, without resolution or even a determination of whether the case could go forward on a class-wide basis. In these cases, class members have not yet received any benefits—and likely will never receive any, based on the disposition of the other cases we studied.

- ***Over one-third (35%) of the class actions that have been resolved were dismissed voluntarily by the plaintiff.*** Many of these cases settled on an individual basis, meaning a payout to the individual named plaintiff and the lawyers who brought the suit—***even though the class members receive nothing***. Information about who receives what in such settlements typically isn't publicly available.
- ***Just under one-third (31%) of the class actions that have been resolved were dismissed by a court on the merits***—again, meaning that class members received ***nothing***.

- ***One-third (33%) of resolved cases were settled on a class basis.***
  - This ***settlement rate is half the average for federal court litigation,*** meaning that a class member is far less likely to have even a chance of obtaining relief than the average party suing individually.
  - ***For those cases that do settle, there is often little or no benefit for class members.***
  - What is more, ***few class members ever even see those paltry benefits—particularly in consumer class actions***. Unfortunately, because ***information regarding the distribution of class action settlements is rarely available***, the public almost never learns what percentage of a settlement is actually paid to class members. But of the six cases in our data set for which settlement distribution data was public, ***five delivered funds to only miniscule percentages of the class: 0.000006%, 0.33%, 1.5%, 9.66%, and 12%.*** Those results are consistent with other available information about settlement distribution in consumer class actions.
  - Although some cases provide for automatic distribution of benefits to class members, the data in our study shows that automatic distribution almost never is used in consumer class actions—only ***one of the 40*** settled cases fell into this category.
  - Some class actions are settled without even the potential for a monetary payment to class members, with the settlement agreement providing for ***payment to a charity or injunctive relief that, in virtually every case, provides no real benefit to class members***.

This study indicates that class actions do not provide class members with anything close to the benefits claimed by their proponents, although they can (and do) enrich attorneys—both on the plaintiffs' and defense side. The lesson that should be taken from this study: It would be irrational for any policymaker to rest a decision on the theoretical benefits of class actions, when the real-world evidence shows that class actions provide little or no benefit, particularly in the consumer and employment context.

It is critically important for policymakers to base decisions on empirical data rather than anecdotes. For a long time, the debate about class actions has suffered from a lack of empirical information. Our study takes an important step forward in filling that gap, by examining a neutrally selected sample of cases.

2. **Of the corporations and firms your law firm has as clients, how many require mandatory arbitration in their contracts with consumers?**

My firm has a large number of clients, some of which enter into contracts with consumers. Because my firm does not collect data about how many clients adopt arbitration agreements in their consumer contracts, I regret that I am unable to answer this question.

3. **How many of the firms you have as clients that use arbitration clauses in their contracts with consumers, also permit consumers to pursue claims collectively/jointly with others, or as part of a class?**

For the reason stated in my answer to question two, I regret that I am unable to answer this question.

4. **How many individual arbitrations asserting consumer claims have proceeded under your clients' arbitration clauses in the last ten years and in how many cases have consumers pursued claims against them in court?**

For the reason stated in my answer to question two, I regret that I am unable to answer this question.

5. **Did you file a brief on behalf of the Chamber of Commerce, Business Roundtable, American Bankers Association and the National Association of Manufacturers in the case *American Express v. Italian Colors* arguing that an arbitration clause should be enforced even if it means a consumer cannot vindicate his or her rights under federal law?**

My colleagues and I filed two *amicus curiae* briefs before the Supreme Court in *American Express v. Italian Colors*, No. 12-133. In a brief at the petition for *certiorari* stage, we represented the Chamber of Commerce, the Business Roundtable, the American Bankers Association, and the National Association of

Manufacturers.[1] In a brief at the merits stage, we represented the Chamber of Commerce and the Business Roundtable.[2]

One of the questions in the case was whether prior Supreme Court decisions that some observers described as creating an "effective vindication" test had any application to the question presented to the Court in the *American Express* case. These briefs argued that these precedents did not apply, but also explained why arbitration clauses do in fact enable consumers to effectively vindicate their federal rights and do so more effectively than lawsuits in court.

Our position was no outlier. The merits-stage brief of the United States in *American Express* also stated that companies can "adopt[] arbitration procedures that can feasibly be invoked even for small-value claims." The brief also stated that "many companies have modified their agreements to include streamlined procedures and premiums designed to encourage customers to bring claims."[3]

In addition, counsel for Italian Colors Restaurant explained in its brief to the Supreme Court that although "[t]he cost-sharing available in class-action litigation provides one mechanism to address the high expert costs" necessary to prove their claim, "it is far from the only mechanism." Indeed, they explained, "[b]ilateral arbitration ***remains feasible*** if costs can be shared or shifted," as under the "arbitration clause at issue in *Concepcion*."[4]

When the Supreme Court decided *American Express Co. v. Italian Colors Restaurant*,[5] it was significant that *even the dissenting Justices* recognized that arbitration provisions—including arbitration provisions that do not provide for class actions or similar procedures—enable consumers and other plaintiffs to vindicate rights conferred by federal law.

For example, many arbitration provisions provide for some combination of (i) incentive or bonus payments designed to encourage the pursuit of small claims, and (ii) the shifting of expert witness costs and attorneys' fees to defendants when the consumer or employee prevails on his or her claim. The AT&T provision at issue in

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[1] Brief of the Chamber of Commerce of the United States of America, Business Roundtable, American Bankers Association, and National Association of Manufacturers as Amici Curiae in Support of Petitioners, *American Express Co. v. Italian Colors Restaurant*, 133 S. Ct. 2304 (2013) (No. 12-133), 2012 WL 3766956.

[2] Brief of the Chamber of Commerce of the United States of America and Business Roundtable as Amici Curiae in Support of Petitioners, *American Express Co. v. Italian Colors Restaurant*, 133 S. Ct. 2304 (2013) (No. 12-133), 2012 WL 6759408.

[3] Brief for the United States as Amicus Curiae Supporting Respondents at 24, 28, *American Express Co. v. Italian Colors Restaurant*, 133 S. Ct. 2304 (2013) (No. 12-133), 2013 WL 367051.

[4] Brief for Respondents at 17-18, 37, *American Express Co. v. Italian Colors Restaurant*, 133 S. Ct. 2304 (2013) (No. 12-133), 2013 WL 267025 (emphasis added).

[5] 133 S. Ct. 2304 (2013).

AT&T Mobility LLC v. Concepcion[6] contains such features. If a consumer obtains an arbitral award that is greater than AT&T's last settlement offer, he or she will receive a minimum recovery of $10,000 plus twice the amount of attorneys' fees that his or her counsel incurred for bringing the arbitration. In addition, under such circumstances, the company is required to reimburse such a customer for reasonable expert witness fees.

As Justice Kagan acknowledged in her dissent in *American Express* (joined by Justices Ginsburg and Breyer), "non-class options abound" for effectively pursuing claims on an individual basis.[7] When an arbitration provision "provide[s] [such] an alternative mechanism to . . . shift . . . the necessary costs" of proving a claim, that eliminates any concern about the ability of individual plaintiffs to vindicate their rights in arbitration.[8] A growing number of companies have adopted approaches that are similar to AT&T's arbitration provision.

The *American Express* dissenting Justices further recognized that "informal coordination among individual claimants" would allow those claimants to share the same lawyer, experts, and costs of proof, thereby reducing the costs to each claimant.[9] For example, an entrepreneurial plaintiffs' lawyer can recruit large numbers of clients (via the internet, social media, or other similar means), file thousands of individual arbitration demands on behalf of those clients, and distribute common costs over all those claimants, making the costs for expert witnesses and fact development negligible on a per-claimant basis.

Of course, *American Express* addressed these questions in the context of claims that might be eligible to be asserted in a class action. When a consumer's claims are not eligible for class action treatment—and that is the case for the lion's share of claims that a consumer may bring—then arbitration often provides the ***only*** effective means of vindicating legitimate claims. The comment filed by the Chamber of Commerce with the CFPB, and attached as Exhibit 3, provides a detailed explanation of these benefits of arbitration at pages 13 to 39.

That comment letter also explains why the claims advanced by critics of arbitration make no sense. Virtually all of those contentions are based on illusions about the litigation system—grounded in the abstract theory rather than the stark reality of what actually happens today in our nation's courts—and misconceptions about arbitration, which are contradicted by numerous empirical studies. The principal proponent of these unsupported, and unsupportable, arguments are organizations representing, or funded by, the trial bar, such as the American Association for Justice (formerly the Association of Trial Lawyers of America, or

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[6] 131 S. Ct. 1740 (2011).

[7] 133 S. Ct. at 2319 (Kagan, J., dissenting).

[8] *Id.* at 2318.

[9] *Id.*

"ATLA")—for which, according to the Associated Press, one of the "[t]op lobbying goals" has been to convince "Congress and [President] Obama to outlaw mandatory binding arbitration in consumer contracts."[10] That is not surprising, because one of the key benefits of arbitration is that its greater efficiency reduces litigation costs, such as attorneys' fees. Lawyers, whether they represent plaintiffs or defendants, typically resist innovations that adversely affect their bottom lines.

On the day of the Subcommittee's hearing, the American Association for Justice posted a blog entry—titled "Top 10 Myths on Forced Arbitration You Will Likely Hear from the U.S. Chamber's Lawyer"[11]—targeting my appearance before the Subcommittee. But the blog post simply recycles false criticisms of arbitration. The comment filed by the Chamber of Commerce with the CFPB, attached as Exhibit 3, provides a detailed rebuttal of most of these criticisms at pages 39 to 55.

To take just one example, the trial lawyers assert that "the arbitrator's decision is final" and "[t]here is **<u>no</u>** appeal to a court of law—even if the arbitrator is biased toward the corporation." That is false: the Federal Arbitration Act specifically states that a consumer or employee may go to court to invalidate the arbitral award on the ground that the arbitrator was biased. Under Section 10 of the FAA. "where there was evident partiality or corruption in the arbitrators"—*i.e.*, any arbitrator was biased—a party to the arbitral award may apply for "an order vacating the award." Moreover, even before arbitration commences, an individual may go to court to challenge the enforceability of the agreement if the specified procedures will produce a biased arbitrator—the United States Court of Appeals for the Ninth Circuit invalidated an arbitration agreement on this basis just last year.[12]

The AAJ blog post also contends that arbitration "denies due process and legal rights" to consumers, but again the rhetoric is contradicted by the facts. As explained in the Chamber's comment letter (Ex. 3 at 23-27), most arbitration provisions do not contain unfair provisions, and the trend has been for companies to make arbitration provisions ever more favorable to their customers and employees. But when courts find overreaching occurs, they have the power to invalidate unfair arbitration clauses and have not hesitated to do so.

In short, the criticisms of arbitration are demonstrably meritless. Arbitration provides consumers, employees, and other potential plaintiffs with the ability to effectively vindicate any meritorious claims that they may have.

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[10] Sharon Theimer & Pete Yost, The Influence Game: Lobbyists adapt to power shift, USA Today, Nov. 14, 2008, http://usatoday30.usatoday.com/news/washington/2008-11-14-567071791_x.htm?csp=34.

[11] Brian Dupre, *Top 10 Myths on Forced Arbitration You Will Likely Hear from the U.S. Chamber's Lawyer*, Take Justice Back (May 21, 2014), http://www.takejusticeback.com/news/top-10-myths-forced-arbitration-you-will-likely-hear-us-chamber%E2%80%99s-lawyer.

[12] *Chavarria v. Ralphs Grocery Co.*, 733 F.3d 916, 923-25 (9th Cir. 2013).

6. **Do you favor repeal of the protections granted to servicemembers against forced arbitration in the Military Lending Act? And do you acknowledge that servicemembers are still being denied the ability to go to court on other lending-related claims under the Servicemember Civil Relief Act?**

I support our servicemembers and am truly grateful for their service to our Nation. In addition, I oppose any violations of the substantive legal rights of our servicemembers.

The Military Lending Act makes it unlawful to extend credit to certain covered servicemembers under an agreement that provides for arbitration as a dispute resolution mechanism.[13] This provision has several unintended consequences that highlight why legislative efforts at eliminating arbitration do more harm than good.

To begin, this provision of the Military Lending Act reduces servicemembers' access to justice. Arbitration can provide servicemembers with an inexpensive and simple means of accessing justice. The weight of the empirical evidence reveals that individuals fare at least as well in arbitration as they would have in court, if not better.[14] It is inexpensive for servicemembers. The American Arbitration Association ("AAA"), for example, requires the business to bear most arbitration costs; many companies pay even the consumer's share, which the AAA caps at $200.[15] A large percentage of servicemembers will pay no attorneys' fees, either.[16] That subsidizes dispute resolution to a much greater extent than litigation in court.

Arbitration's simplicity and flexibility, moreover, mean that servicemembers can resolve their claims themselves—without a lawyer. The AAA, for example, offers hearings by telephone, and participants can file arbitration demands online

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[13] 10 U.S.C. § 987(e)(3).

[14] *Compare* Christopher R. Drahozal & Samantha Zyontz, *An Empirical Study of AAA Consumer Arbitrations*, 25 Ohio St. J. on Disp. Resol. 843, 898 (2010) (studying claims filed with the American Arbitration Association and concluding that consumers win relief 53.3% of the time), *with* Theodore Eisenberg et al., *Litigation Outcomes in State and Federal Courts: A Statistical Portrait*, 19 Seattle U. L. Rev. 433, 437 (1996) (observing that in 1991-92, plaintiffs won 51% of jury trials in state court and 56% of jury trials in federal court, while in 1979-1993 plaintiffs won 50% of jury trials).

[15] AAA, *Costs of Arbitration (Including AAA Administration Fees)*, https://www.adr.org/cs/idcplg?IdcService=GET_FILE&dDocName=ADRSTAGE2009593&RevisionSelectionMethod=LatestReleased.

[16] Elizabeth Hill, *Due Process at Low Cost: An Empirical Study of Employment Arbitration Under the Auspices of the American Arbitration Association*, 18 Ohio St. J. on Disp. Resol. 777, 802 (2003) (finding that lower-income employees "paid no forum fees" in 61% of the cases studies; employees also paid no attorney's fees in 32$ of the cases).

and otherwise communicate with the AAA and arbitrator through email.[17] Servicemembers therefore would not have to take time off work to pursue their disputes. Meanwhile, studies show that arbitration is much quicker than bringing a lawsuit in the crowded, overburdened federal and state court systems. [18]

In addition, the provision described in the question may well have the effect of reducing servicemembers' access to credit. Servicemembers benefit from arbitration because it systematically reduces the costs involved with resolving disputes, which leads in turn to lower prices for products and services—including credit. Creditors face a number of costs in providing credit to their customers (including servicemembers); these costs include absorbing the costs of litigation. These include not only settlements and judgments resolving meritorious claims brought by servicemembers, but also the costs of defending against all lawsuits—whether or not a servicemember prevails on the claim. The costs associated with litigation in court are much higher than those incurred in arbitration, because it is faster and more flexible than litigation. As scholars have noted, "companies . . . include arbitration clauses in their contracts to cut dispute resolution costs and produce savings that they may pass on to consumers through lower prices."[19] If businesses and individuals alike cannot take advantage of the reduction in litigation expenses associated with arbitration, many servicemembers may find that credit is less available to them—or is available only on less favorable terms.

I believe that servicemembers would benefit greatly from the repeal of the Military Lending Act provision that prevents them from taking advantage of arbitration as a low-cost, efficient dispute-resolution mechanism, just as much as other participants in our economy.

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[17] AAA, *Consumer Related Disputes Supplementary Procedures 6*, Mar. 1, 2013, https://www.adr.org/cs/idcplg?IdcService=GET_FILE&dDocName=ADRSTAGE2009997&RevisionSelectionMethod=LatestReleased; *see also* AAA, *Commercial Arbitration Rules and Mediation Procedures* R-43, Oct. 1, 2013, http://www.adr.org/aaa/ShowProperty?nodeId=/UCM/ADRSTG_004103&revision=latestreleased ("The AAA, the arbitrator and the parties may also use overnight delivery or electronic facsimile transmission (fax), or electronic (e-mail) to give the notices required by these rules. Where all parties and the arbitrator agree, notices may be transmitted by e-mail or other methods of communication."). And in practice, most communications with the AAA after the initial filing are handled by email.

[18] *See Analysis of the American Arbitration Association's Consumer Arbitration Caseload*, http://www.adr.org/aaa/ShowPDF?doc=ADRSTG_004325 (consumer arbitrations administered by the AAA proceed to an award in an average of four to six months); U.S. District Court—Judicial Caseload Profile (2013), http://www.uscourts.gov/Statistics/FederalCourtManagementStatistics.aspx (reporting figures for 12-month period ending June 2013, and revealing that most civil litigants wait over two years before reaching trial).

[19] Amy J. Schmitz, *Building Bridges To Remedies For Consumers In International Econflicts*, 34 U. Ark. Little Rock L. Rev. 779, 779–80 (2012); *see also, e.g.*, Stephen J. Ware, *The Case for Enforcing Adhesive Arbitration Agreements—With Particular Consideration of Class Actions and Arbitration Fees*, 5 J. Am. Arb. 251, 254–55 (2006).

As for the Servicemembers Civil Relief Act ("SCRA"), that statute recognizes that servicemembers face special challenges—and therefore provides them with essential protections related to rent, mortgages, consumer loan contracts, and other consumer financial products and services. Servicemembers need a way of resolving their SCRA claims fairly, inexpensively, and efficiently.

Unfortunately, most servicemembers will find that the high cost of litigation in our court system precludes them from having their day in court. Most individuals—including servicemembers—find that the vast majority of legal disputes that they have are relatively low dollar and involve facts too individualized to be eligible for a class action. In those cases, it may be difficult for them to secure a lawyer to represent them in court—and the lawyer may demand a share of any settlement or other recovery in addition to any fees awarded under the statutory fee-shifting provision. For servicemembers with these disputes, arbitration provides an invaluable means of resolving claims through fair access to a neutral decisionmaker at low or no cost, for the reasons I have explained above and in my answer to question five.

The Chamber has opposed legislation that would deprive servicemembers of access to the arbitration system that may be the only meaningful forum for resolving their disputes. For example, the Chamber opposes the so-called SCRA Rights Protection Act of 2014, introduced in the 113th Congress as S. 1999, which would effectively eliminate the availability of arbitration for disputes subject to SCRA. The primary effect of eliminating arbitration would be to give plaintiffs' lawyers a monopoly over litigating these claims, and leave servicemembers' ability to enforce their rights at the mercy of those lawyers. For most servicemembers, the elimination of arbitration will do more harm than good.

In short, the needs of servicemembers can readily be met in the arbitration system. But the government has an important role—and a special obligation—in assisting servicemembers whose legal rights may have been violated. It can do so in at least two ways.

First, the CFPB has supervision and examination powers that can help monitor potential violations of servicemembers' rights, as well as enforcement authority with respect to consumer protection laws.[20] The CFPB has created an Office of Servicemember Affairs. That office, according to a letter on the CFPB's web site by Holly Petraeus, "will ask CFPB bank and non-bank examiners to keep an eye out for military-specific issues. When we find out about people breaking consumer financial protection laws to harm servicemembers, we'll help CFPB enforcement teams take action against them. And we plan to make it easy for

[20] *See* 12 U.S.C. § 5514(a)(1) (providing for supervisory authority over certain nonbank covered persons); *id.* § 5514(c) (enforcement authority); *see also* Defining Larger Participants of the Consumer Reporting Market, 77 Fed. Reg. 42,874 (July 20, 2012) (codified at 12 CFR Part 1090) (addressing scope of supervision authority over nonbank covered persons under § 5514).

military personnel and their families to contact the CFPB with questions or complaints about consumer financial products and services."[21] Thus, especially if there were a systemic problem that adversely affected our servicemembers, the CFPB possesses the authority and ability to assist them.

Second, the Judge Advocate General's Corps for the branches of the armed services provides legal assistance to servicemembers and retirees; this legal assistance extends to providing advice about real property disputes and the Servicemembers' Civil Relief Act.[22]

7. **Do you think that the Consumer Financial Protection Bureau should hold predatory lenders accountable for bad practices that affect consumers?**

Lenders that violate the law definitely should be held accountable—by appropriate regulators and law enforcement authorities. As I explained in my written remarks, the Chamber supports sound consumer protection regulation that deters and punishes financial fraud and predation. Efforts by the Congress and regulators toward that goal serve the laudable purpose of protecting consumers from deceptive and exploitative practices and ensuring that law-abiding businesses can compete on a level playing field.

An essential corollary to appropriately aggressive enforcement is the issuance—by the Bureau and other regulators—of regulations that provide information sufficient to enable law-abiding businesses to understand the governing legal standards and to put in place compliance systems to conform their actions to what the law requires. Indeed, scholars have long shown that legal uncertainty results in over-deterrence of socially beneficial behavior.[23]

Finally, as discussed in my written testimony, the Bureau and other regulators should obtain public comment before adopting such standards, so that the rules or guidance will reflect market realities and not lead to unanticipated adverse effects, such as constricting the access to credit that consumers and small businesses need. By ensuring that the CFPB's regulations are produced through a collaborative and deliberative process—and ensuring that its actions reflect the priorities and policies that Congress chose when it granted the CFPB with

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[21] http://www.consumerfinance.gov/petraeus-letter/.

[22] For example, the Regional Legal Service Office, Naval District Washington, provides legal assistance to individuals in "Maryland, Northern Virginia, and the District of Columbia." Its website states that it allows "service members and their dependents, reservists on active duty for 30 days or more, and retirees, as resources permit" to obtain assistance in a number of areas, including "Real Property," "SCRA," and "Consumer/Financial Affairs" issues. *See* http://www.jag.navy.mil/legal_services/rlso/rlso_naval_district_washington.htm.

[23] *See, e.g.*, Richard Craswell & John Calfee, *Deterrence and Uncertain Legal Standards*, 2 J.L. Econ. & Org. 279, 298-99 (1986).

authority in the first place—all market participants will find that they have greater notice about what practices will result in enforcement actions, and truly bad practices will be eliminated from the market.

Exhibit 1

Do Class Actions Benefit Class Members?

An Empirical Analysis of Class Actions

By Mayer Brown LLP

Executive Summary

This empirical study of class action litigation—one of the few to examine class action resolutions in any rigorous way—provides strong evidence that class actions provide far less benefit to individual class members than proponents of class actions assert.

The debate thus far has consisted of competing anecdotes. Proponents of class action litigation contend that the class device effectively compensates large numbers of injured individuals. They point to cases in which class members supposedly have obtained benefits. Skeptics respond that individuals obtain little or no compensation and that class actions are most effective at generating large transaction costs—in the form of legal fees—that benefit both plaintiff and defense lawyers. They point to cases in which class members received little or nothing.

Rather than simply relying on anecdotes, this study undertakes an empirical analysis of a neutrally-selected sample set of putative consumer and employee class action lawsuits filed in or removed to federal court in 2009.[1]

Here's what we learned:

- In our entire data set, ***not one of the class actions ended in a final judgment on the merits for the plaintiffs***. And none of the class actions went to trial, either before a judge or a jury.
- The vast majority of cases produced ***no benefits to most members of the putative class***—even though in a number of those cases the lawyers who sought to represent the class often enriched themselves in the process (and the lawyers representing the defendants always did).
    - ***Approximately 14 percent of all class action cases remained pending four years after they were filed***, without resolution or even a determination of whether the case could go forward on a class-wide basis. In these cases, class members have not yet received any benefits—and likely will never receive any, based on the disposition of the other cases we studied.
    - ***Over one-third (35%) of the class actions that have been resolved were dismissed voluntarily by the plaintiff.*** Many of these cases settled on an individual basis, meaning a payout to the individual named plaintiff and the lawyers who brought the suit—***even***

though the class members receive nothing. Information about who receives what in such settlements typically isn't publicly available.

  - ***Just under one-third (31%) of the class actions that have been resolved were dismissed by a court on the merits***—again, meaning that class members received ***nothing***.

- One-third (33%) of resolved cases were settled on a class basis.
  - This ***settlement rate is half the average for federal court litigation,*** meaning that a class member is far less likely to have even a chance of obtaining relief than the average party suing individually.
  - ***For those cases that do settle, there is often little or no benefit for class members.***
  - What is more, ***few class members ever even see those paltry benefits—particularly in consumer class actions***. Unfortunately, because ***information regarding the distribution of class action settlements is rarely available,*** the public almost never learns what percentage of a settlement is actually paid to class members. But of the six cases in our data set for which settlement distribution data was public, ***five delivered funds to only miniscule percentages of the class: 0.000006%, 0.33%, 1.5%, 9.66%, and 12%.*** Those results are consistent with other available information about settlement distribution in consumer class actions.
  - Although some cases provide for automatic distribution of benefits to class members, automatic distribution almost never is used in consumer class actions—only ***one of the 40*** settled cases fell into this category.
  - Some class actions are settled without even the potential for a monetary payment to class members, with the settlement agreement providing for ***payment to a charity or injunctive relief that, in virtually every case, provides no real benefit to class members***.

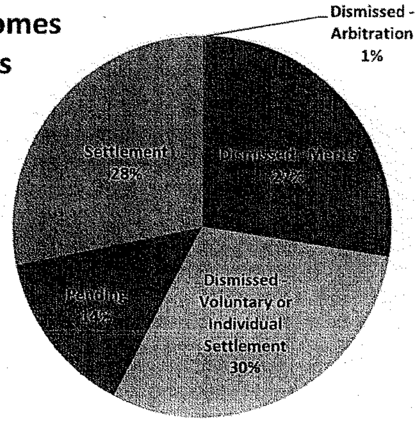
The bottom line: The hard evidence shows that class actions do not provide class members with anything close to the benefits claimed by their proponents, although they can (and do) enrich attorneys. Policymakers who are considering the efficacy of class actions cannot simply rest on a theoretical assessment of class actions' benefits or on favorable anecdotes to justify the value of class actions. Any decision-maker wishing to rest a policy determination on the claimed benefits of class actions would have to engage in significant additional empirical research to conclude—contrary to what our study indicates—that class actions actually do provide significant benefits to consumers, employees, and other class members.

Results

Overall Outcomes

Of the 148 federal court class actions we studied that were initiated in 2009, 127 cases (or nearly 86 percent) had reached a final resolution by September 1, 2013, the date when the study closed.

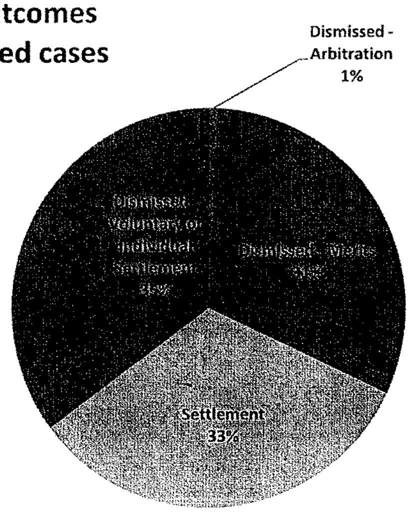
Figure 1: Outcomes in 148 cases



Zero* cases resulted in a judgment on the merits.** Of the 148 cases in our sample set, ***not one had gone to trial—either before a judge or jury. And, as of the closing date of our study, ***not one resulted in a judgment for the plaintiffs on the merits.***

Unlike ordinary (non-class) disputed cases, some of which end with a judgment on the merits in favor of the plaintiffs or defendants, class actions end without any determination of the case's merits. The class action claims that make it past the pleadings stage and class-certification gateway virtually always settle—regardless of the merits of the claims.

Figure 2: Outcomes in 127 resolved cases



Indeed, Justice Ruth Bader Ginsburg has recognized that "[a] court's decision to certify a class * * * places pressure on the defendant to settle even unmeritorious claims."[2] Then-Chief Judge Richard Posner of the U.S. Court of Appeals for the Seventh Circuit explained that certification of a class action, even one lacking in merit, forces defendants "to stake their companies on the outcome of a single jury trial, or be forced by fear of the risk of bankruptcy to settle even if they have no legal liability."[3] And Judge Diane Wood of the Seventh Circuit has explained that certification "is, in effect, the whole case."[4] That may be why another study of class actions reported that "[e]very case in which a motion to certify was granted, unconditionally or for settlement purposes, resulted in a class settlement."[5]

Fourteen percent of the class actions filed remain unresolved. Even though our study period encompassed more than 44 months since the filing of the last case in our sample (and 55 months from the filing of the first case), a significant number of cases—21 of the 148 in our sample, or 14%—remained pending with no resolution, let alone final judgment on the merits.[6]

And there is no reason to believe that these cases are more likely to yield a benefit for class members than the cases that have been resolved thus far. In 15 of these cases either no motion for class certification has been filed or the court has not yet ruled on the motion, and in another 2 the court denied certification. In a significant proportion of these pending cases, it seems likely that class

certification will be denied or never ruled upon before the case is ultimately dismissed. After all, prior studies indicate that nearly 4 out of every 5 lawsuits pleaded as class actions are not certified.[7]

Over one-third of the class actions that have been resolved were dismissed voluntarily by the named plaintiff and produced no relief at all for the class. Forty-five cases were voluntarily dismissed by the named plaintiff who had sought to serve as a class representative or were otherwise resolved on an individual basis. That means either that the plaintiff (and his or her counsel) simply decided not to pursue the class action lawsuit, or that the case was settled on an individual basis, without any benefit to the rest of the class. These voluntary dismissals represent 30 percent of all cases studied, or 35 percent of cases that reached a resolution by the beginning of September 2013.[8]

In fourteen of the cases that were voluntarily dismissed—approximately one-third of all voluntary dismissals in the data set—the dismissal papers, other docket entries, or contemporaneous news reports made clear that the parties were settling the claim on an individual basis, although the terms of those settlements were not available. Many of the remaining voluntary dismissals also may have resulted from individual settlements.

These settlements often provide that the plaintiff—and his or her attorney—receive recoveries themselves, even though the rest of the class that they sought to represent receive ***nothing***. When parties settle cases on an individual basis, those settlements often are confidential, and the settlement agreements therefore are not included on the court's public docket.[9]

Just under one-third of the class actions that have been resolved were dismissed on the merits. In addition to the 45 cases dismissed voluntarily by plaintiffs, 41 cases were dismissed outright by federal courts, through a dismissal on the pleadings or a grant of summary judgment for the defendant. The courts in these cases concluded that the lawsuits were meritless before even considering whether the case should be treated as a class action. These represented 27 percent of all cases studied, and 31 percent of resolved cases.

In other words, ***in over half of all putative class actions studied—and nearly two-thirds of all resolved cases studied—members of the putative class received zero relief.*** These results are depicted in Figures 1 and 2, which appear below. And these results are broadly consistent with other empirical studies of class actions. If anything, for reasons explained in Appendix C, abusive, illegitimate class actions are probably under-represented in our sample, and the sample therefore probably significantly ***overstates*** the extent to which class members benefit from the class action. For comparison, another study found that ***84% of class actions ended without any benefit to the class.***[10]

Fewer than thirty percent of the cases filed were settled. All of the remaining class actions that have been concluded were settled on a class-wide basis: The parties reached settlements in 40 cases—28% of all cases studied, or 33% of all resolved cases.[11]

This subset of class actions is the only one in our study in which it is possible that absent class members could possibly receive any benefit at all. As we next discuss, however, the benefits claimed to be associated with such settlements are largely illusory.

Class Settlements

Class actions have a significantly lower settlement rate than other federal cases. The settlement rate for our sample of cases—33% of resolved cases—is much lower than for federal court litigation as a whole. One study of federal litigation estimated that "the aggregate settlement rate across case categories" for two districts studied was "66.9 percent in 2001-2002."[12] Even the least frequently settled case category in that study—constitutional litigation—had a higher settlement rate (39%) than the 33% for the class action cases we studied.[13]

Thus, ***class actions are significantly less likely to produce settlements, and therefore significantly less likely to produce any benefit to class members, than other forms of litigation***. Settlement is the only resolution that produces even the possibility of a benefit to class members, because class actions are virtually never resolved though judgments on the merits, a fact that our study corroborates. And the settlement rate in our sample set is not an outlier: a study of class actions brought in California state court in 2009 reported a similarly low settlement rate of 31.9%.[14]

Moreover, the fact that 40 of our sample cases were settled says nothing about the extent of the benefit, if any, that those settlements conferred on class members.

Many class settlements—and virtually all settlements of consumer class actions—produce negligible benefits for class members. It is a notoriously difficult exercise to assess empirically how class members benefit from class action settlements. These settlements fall generally into three basic categories:

- **"Claims-made" settlements**, under which class members are bound by a class settlement—and thereby release all of their claims—but only obtain recoveries if they affirmatively request to do so, usually through use of a claims form.[15] Funds not distributed to claimants are returned to the defendant or, in some cases, distributed to a charity via the *cy pres* process (which creates significant additional problems, as we discuss below). They are not given to class members. Most settlements fall into this category.

- **Injunctive relief/*cy pres* settlements**, in which the relief provided to settling class members involves only injunctive relief (which may provide little or no benefit to class members) or *cy pres* distributions (in which money is paid to charitable organizations rather than class members).

- **"Automatic distribution" settlements**, in which each class member's settlement is distributed automatically to class members whose eligibility and alleged damages could be ascertained and calculated—such as retirement-plan participants in ERISA class actions.

The parties typically have no meaningful choice among these methods of structuring a settlement. Automatic distribution settlements are feasible only if the parties have the names and current addresses of class members as well as the ability to calculate each class member's alleged damages. But companies typically lack the information needed to settle cases using an automatic distribution mechanism—especially in consumer cases, where purchase records may be incomplete or unavailable, and/or class members' claimed injuries may vary widely and unpredictably.

Thus, consumer class actions are almost always resolved on a claims-made basis, and the actual amount of money delivered to class members in such cases almost always is a miniscule percentage of the stated value of the settlement. That is because, in practice, relatively few class members actually make claims in response to class settlements: many class members may not believe it is not worth their while to request the (usually very modest) awards to which they might be entitled under a settlement. And the claim-filing process is often burdensome, requiring production of years-old bills or other data to corroborate entitlement to recovery.

The class members' actual benefit from a settlement—if any—is almost never revealed. Remarkably, the public almost never has access to settlement distribution data. One study found that settlement distribution data were available in "fewer than one in five class actions in [the] sample."[16] Companies and their defense lawyers are hesitant to reveal how much a company has been required to pay out to class members, and plaintiffs' counsel have strong incentives to conceal the information because requests for attorneys' fees based on a settlement's face value will appear overstated when compared to the actual value. Judges are often happy to have the case resolved, and therefore have little to no interest in requiring transparency in the settlement distribution process.

While third-party claims administrators often possess direct information about claims rates, they are routinely bound by contract to maintain the confidentiality of that information in the absence of party permission, a court order, or other legal authority.[17] This may be a function of the incentive shared by class counsel and defense counsel to avoid facilitating grounds for a class member to object that a settlement was unfair because it provided too little tangible benefit to the class.[18] Indeed, "[h]ow many people were actually members of this class, how many of these class members actually submitted a claim form, and how much they were actually paid appear to be closely held secrets between the class counsel and the defendant."[19]

In rare cases in which class-settlement distribution data was available, few class members received any benefit at all. In our data set, ***18 cases were resolved by claims-made settlements***—44% of the total. ***We were able to obtain meaningful data regarding the distribution of settlement proceeds in only six of the 18 cases***, which is not surprising given the well-established and widespread lack of publically available information regarding the extent to which class members actually benefit from settlements. ***Five of the six cases resulted in minuscule claims rates: 0.000006%, 0.33%, 1.5%, 9.66%, and 12%.***[20] These extremely small claim-filing rates are consistent with the few other reports of claim rates in class action settlements that have come to light.

As one federal court observed, "'claims made' settlements regularly yield response rates of 10 percent or less."[21] In fact, the claims rate frequently is ***much lower***—in the single digits. Appendix A contains a list of more than 20 additional cases for which information about distributions is available, all of which involved distributions to less than seven percent of the class and many of which involved distributions to less than one percent of the class.

There is thus ample evidence to infer that ***the extremely small claims rates for cases in our sample is representative of what happens in class actions generally, and particularly in consumer class actions.***[22] And although documents filed in the remaining 12 of the 18 claims-made settlements lacked information about claims rates, there is every reason to believe that class members made claims at the small rates ordinarily observed in such cases. While some may argue that parties should use automatic distribution mechanisms instead of "claims-made" settlements to resolve class actions, the reality is that automatic distribution is difficult, if not impossible, to achieve in many (perhaps most) consumer class actions.

Only *one* consumer class action settlement was resolved through automatic distribution. Of the remaining 22 settled cases in our sample, 13 involved ***settlements with automatic distribution of settlement proceeds.*** Ten of these 13 involved claims by retirement plan participants in ERISA class actions, in which the class members' eligibility and alleged damages could be easily ascertained and calculated based on their investment positions. The plans of distribution in these 10 cases generally involved lump-sum payments to the plan, which would then be allocated directly to plan members' accounts.

The other three automatic-distribution settlements were reached in consumer and employment class actions. In each case—atypical of most class actions—the defendant was in a position to ascertain and calculate class members' eligibility and alleged damages:

- In one, an employer settled claims that it conspired with health care providers and insurers to dictate medical treatment provided to about 13,764 employees injured on the job, whose identities were readily known to the defendant employer; employees who were treated by one health-care provider received a check for $520, while injured employees treated by another provider received a check for $50.[23]
- In a second settlement, a credit-card issuer settled claims that it improperly raised the minimum monthly payment and added new fees in connection with promotional loan offers. The defendant issued class members a flat-rate payment of $25, plus (for certain customers) a share of the remaining settlement fund calculated by taking into account the ways the class member had used the promotional loan and had been charged fees.[24]
- Finally, as we explain in more detail below, a third settlement resolved privacy claims against a mobile-phone gaming app developer in exchange for 45 in-game "points" that were automatically distributed to users so they could advance through the game's levels.[25]

Thus, only two consumer cases involved automatic distributions, and in one the distribution involved "game points." ***Only a single settled consumer class action—one of 127 class actions resolved—conveyed real benefits to anything more than a small percentage of the class.***

Cy pres **awards and injunctive relief serve primarily to inflate attorney's fee awards—and benefit third parties with little or no ties to the putative class.** The final group of 9 settled cases largely involved ***injunctive relief or cy pres distributions.*** Because these cases involve no monetary compensation to class members, it is difficult for outsiders to assess the claimed benefit. Certainly, ***in many cases "injunctive relief" has little or no real-world impact on class members, but is used to provide a basis for claiming a "benefit" to class members justifying an award of attorneys' fees to class counsel*** (as we detail below). The injunctive-relief-only settlements we reviewed included the following:

- Plaintiff subscribers of America Online ("AOL") claimed that it embedded advertisements at the bottom of the subscribers' email messages without their permission. After an early settlement was vacated on appeal for improper *cy pres* awards to unrelated charities, the parties again settled the claims, with AOL promising to tell subscribers how to opt out of email advertisements if it restarted the challenged practice.[26]

- In a class action involving claims that a social-networking app developer failed to protect properly the personally identifiable information of 32 million customers from a data security breach, the settlement provided that the defendant will undergo two audits of its information security policies with regard to maintenance of consumer records, to be made by an independent third party. The settlement explicitly reserves the rights of the plaintiff class to sue for monetary relief.[27]

- Plaintiffs brought false advertising claims against Unilever, contending that it had misrepresented the health or nutritional characteristics of "I Can't Believe It's Not Butter." As part of the settlement, Unilever was to remove all partially hydrogenated vegetable oils from its soft spreads by December 31, 2011, and from its stick products by December 31, 2012, and keep those ingredients out of those products for 10 years. Although they did not receive monetary compensation, class members released all monetary and equitable claims other than claims for personal injury.[28]

- Finally, in a class action alleging the violation of consumer protection laws arising out of the marketing of Zicam supplements (sold as a way of combating the common cold), the parties provided for a number of non-pecuniary "benefits"—all in the form of labeling changes. These include: (1) indicating that the FDA has not approved the supplements; (2) disclosing that customers with zinc allergies or sensitivities should consult a doctor; (3) informing customers that the products are not intended to be effective for the flu or for allergies; and (4) removing language recommending that customers continue to use the products for 48 hours after cold symptoms subside. If the court approves the settlement and requested attorneys' fees, the

defendant will pay plaintiff's counsel up to $1.75 million in fees in one case, and another $150,000 in a related MDL proceeding.[29]

Like injunctive relief settlements, ***the* cy pres *doctrine is being used by plaintiffs' lawyers to inflate artificially the purported size of the benefit to the class in order to justify higher awards of attorney's fees to the plaintiffs' lawyers.*** In four of the cases we examined, the settlement provided that one or more charitable organizations would receive either all monetary relief, or any remaining monetary relief after claims made were paid out.

Courts often assess the propriety of an attorneys' fee award in the settlement context by comparing the percentage of the settlement paid to class members or charities with the percentage of the settlement allocated to class counsel.[30] That approach has been endorsed by the Manual for Complex Litigation.[31] If no funds are allocated to the class, or a small portion of the amount ostensibly allocated to the class is actually distributed and the remainder of the funds returned to the defendants, the relative percentages could be disturbing to a court reviewing the fairness of the settlement. But if the amount not collected by class members is contributed to a charity that can be claimed to have some tenuous relationship to the class, then the percentage allocated to attorneys' fees may appear more acceptable.

The result, as one district court has warned, is that attorney fee awards "determined using the percentage of recovery" will be "exaggerated by *cy pres* distributions that do not truly benefit the plaintiff class."[32] As Professor Martin Redish has noted, the *cy pres* form confirms that "[t]he real parties in interest in...class actions are...the plaintiffs' lawyers, who are the ones primarily responsible for bringing th[e] proceeding."[33] One district court has noted that when a consumer class action results in a *cy pres* award that "provide[s] those with individual claims no redress," where there are other "incentives" for bringing individual suits, the class action fails the requirement that the class action be "superior to other available methods" of dispute resolution.[34]

Lawyers (as opposed to class members) were the principal beneficiaries of the remaining settlements in our study. For the *"cy pres"* settlements in our data set, and the "claims made" settlements for which there is no distribution data, publicly available information provides further support for the conclusion that little in the way of benefit flows to class members. Examples from our data set include:

- ***Disproportionate allocation of settlement funds to attorneys' fees.*** Plaintiffs brought a class action alleging that the defendants improperly interfered with the medical care of injured employees in violation of Colorado law.[35] Under the settlement agreement, the defendants (who denied wrongdoing) were required to make an $8 million fund available to compensate more than 13,500 class members. But class counsel received over $4.5 million out of the $8 million—more than 55 percent of the fund.[36]
- ***Named plaintiffs object to the settlement.*** In a class action against the National Football League, retired players alleged that the league was using their names and likenesses without compensation to promote the league. The NFL and some players settled the class-wide claims

under federal competition law and state right of publicity laws. But the original named plaintiffs who spearheaded the litigation objected to the settlement, arguing that it provided ***no direct payout to the retired players***.[37] Rather, it created an independent organization that would fund charitable initiatives related to the health and welfare of NFL players—and would create a licensing organization that would help fund the independent organization. Meanwhile, "[p]laintiffs' lawyers would receive a total of $7.7 million under the proposed agreement."[38]

- ***Low recovery for class members.*** Plaintiffs alleged in eight consolidated class actions that their employer, a bank, violated the federal Employee Retirement Income Security Act (ERISA) by offering its own stock as a retirement plan investment option while hiding the true extent of the bank's losses in the mortgage crisis.[39] The class settlement established a $2.5 million common fund that was ostensibly designed to compensate the employees for their losses arising from the bank's alleged breach of fiduciary duty.[40] But commentators note that, when all of the allegations in the various complaints were taken into account, plaintiffs had alleged more than $50 million in losses, meaning that class members would recover no more than five cents on the dollar.[41] And according to the plan of allocation, members of the settlement class who were calculated to have suffered damages less than $25 would receive *nothing*[42]—meaning that their claims were released without even the opportunity to receive something in exchange. Meanwhile, the plaintiffs' attorneys received a fee award amounting to 26% of the common fund ($645,595.78), plus $104,404.22 in expenses.[43]

- ***Settlement requires further use of defendant's services.*** A plaintiff filed a class action alleging that certain mobile-phone gaming apps were improperly collecting and disseminating users' mobile phone numbers.[44] Under the terms of the settlement agreement, class members were not entitled to any monetary payment. Instead, they were slated to receive 45 in-game "points" (with an approximate cash value of $3.75) per mobile device owned; the points could be used to advance through the gaming apps' levels.[45] These points could be redeemed or used only within the defendant's apps.[46] Unsurprisingly, the plaintiffs' counsel were not paid in points, but instead were awarded $125,000 in attorneys' fees.

- ***Attorneys seek fees far exceeding class recovery.*** Class counsel in a case involving allegedly faulty laptops found their fee request chopped down from $2.5 million to $943,000.[47] The settlement resulted in a recovery of $889,000 to claimants, plus $500,000 in additional costs for administering the settlement—meaning that the attorneys were seeking just under ***three times*** the amount that would have gone directly to the class—and even after the fees were cut down, they still represented 106 percent of the class's direct recovery.

These characteristics are not unique to the sample cases. To the contrary, results are consistent with a significant number of class action settlements that produce minimal benefits for the class members themselves. We summarize additional examples of such settlements—taken from outside our data set—in Appendix B.

Other studies of class settlements and attorneys' fees confirm that these examples are not outliers: Such settlements commonly produce insignificant benefits to class members and outsize benefits to class counsel. A RAND study of insurance class actions found that attorneys' fees amounted to ***an average of 47% of total class-action payouts***, taking into account benefits actually claimed and distributed, rather than theoretical benefits measured by the estimated size of the class. "In a quarter of these cases, the effective fee and cost percentages were 75 percent or higher and, in 14 percent (five cases), the effective percentages were over 90 percent."[48]

In other words, for practical purposes, counsel for plaintiffs (and for defendants) are frequently the only real beneficiaries of the class actions.

Conclusion

This study confirms that class actions rarely benefit absent class members in whose interest class actions are supposedly initiated. The overwhelming majority of class actions are dismissed or dropped with ***no recovery*** for class members. And those recoveries that class settlements achieve are typically minimal—and obtained only after long delays. To be sure, not every class action is subject to these criticisms: a few class actions do achieve laudable results. But virtually none of those were consumer class actions. Certainly our analysis demonstrates—at a bare minimum—that the vast majority of class actions in our sample set cannot be viewed as efficient, effective, or beneficial to class members.

Appendix A: Additional Examples of Settlements With Payments to a Very Small Percentage of Class Members

- The Seventh Circuit vacated an order approving a class action settlement so that the district court could "evaluate whether the settlement is fair to class members," where (among other problems with the settlement) only "a *paltry* three percent" of the quarter-million-wide proposed class "had filed proofs of claim."[49] And the Third Circuit recently noted that "consumer claim filing rates *rarely* exceed seven percent, even with the most extensive notice campaigns."[50]
- One affidavit analyzed 13 cases for which data had been disclosed (and in which the settlement was approved). The median claims rate was 4.70%. The highest claims rate in those cases was 5.98%, and the lowest non-zero claims rate was 0.67%. In two cases, the claims rate was 0%—reflecting that not a single class member obtained the agreed-on recovery.[51]
- A class action alleging antitrust claims in connection with compact disc "music club" marketing settled, with only 2% of the class making claims for vouchers (valued at $4.28) for CDs.[52]
- Indeed, in many cases, the claims rate may be well under 1 percent.
  - Fair Credit Reporting Act case: court noted that "less than one percent of the class chose to participate in the settlement."[53]
  - Case alleging that a software manufacturer sold its customers unnecessary diagnostic tools: court approved settlement despite the fact that only 0.17% of customers made claims for a $10 payment, because "the settlement amount is commensurate with the strength of the class' claims and their likelihood of success absent the settlement."[54]
  - Case involving product liability claims related to alleged antenna problems with Apple's iPhone 4: court approved settlement noting that the "number of claims represents somewhere between 0.16% and 0.28% of the total class."[55]
  - Class action alleging fraud in the procurement of credit-life insurance: Supreme Court of Alabama noted that "only 113 claims" had been made in a class of approximately 104,000—or a response rate of 0.1%.[56]
  - Action alleging that restaurant chain had printed credit-card expiration dates on customers' receipts: "approximately 165 class members" out of 291,000—or fewer than 0.06% of the class—"had obtained a voucher" for one of four types of menu items worth no more than $4.78.[57]

- Class action alleging that Sears had deceptively marketed automobile-wheel alignments: "only 337 valid claims were filed out of a possible class of 1,500,000"—a take rate of just over 0.02%.[58]
- Class action alleging that video game manufacturer had improperly included explicit sexual content in the game: ***one fortieth of one percent*** of the potential class (2,676 of 10 million) made claims.[59]
- Class action involving allegations that a Ford Explorer was prone to dangerous rollovers: only 75 out of "1 million" class members—or ***less than one hundredth of one percent***—participated in the class settlement.[60]

Appendix B: Additional Examples of Settlements Providing Negligible Benefits to Class Members

- ***Class members receive extended membership in buying club.*** In a class action against DirectBuy—a club for which customers pay a membership fee to purchase goods at lower prices—the plaintiffs alleged that the defendant had misrepresented the nature of the discounts that were available through the club.[61] The settlement afforded class members nothing other than discounts for renewal or extension of their memberships in the very club that was alleged to have tricked them into joining in the first place. Meanwhile, the attorneys for the class "could receive between $350,000 and $1 million."[62]

- ***$21 million for the lawyers, pennies and coupons for the class members.*** One Missouri class settlement in a case against a brokerage house alleging breaches of fiduciary duties provided $21 million to class counsel, but only $20.42 to each of the brokerage's former customers and three $8.22 coupons to each current customer. And most of the coupons are unlikely to be redeemed.[63]

- ***Class members receive right to request $5 refund, lawyers take (and fail to disclose sufficiently) $1.3 million in fees.*** Under the settlement of a class action in which the plaintiffs alleged that Kellogg's had misrepresented that Rice Krispies are fortified with antioxidants, class members could request $5 refunds for up to three boxes of cereal purchased between June 1, 2009, and March 1, 2010.[64] Class counsel sought $1.3 million in attorneys' fees on a claim fund valued at $2.5 million to be paid out to class members.[65]

- ***Class receives opportunity to attend future conferences.*** In a 2009 settlement in the District of Columbia, a court approved a settlement against a conference organizer that failed to deliver promised services to those who had paid to attend. The settlement provides class members with nothing other than coupons to attend future events put on by the same company alleged to have bilked them in the first place; class counsel will take $1.4 million in fees.[66]

- ***Class members receive nothing, class counsel take $2.3 million.*** In a $9.5 million settlement of a class action against Facebook over the disclosure to other Facebook users of personal information about on-line purchases through Facebook's "Beacon" program, the class members received no remedy whatever for the invasions of their privacy and were barred from making future claims for any remedy. Instead, approximately $6.5 million went to create and fund a new organization that would give grants to support projects on internet privacy; a few thousand dollars went to each of the named plaintiffs as "incentive payments"; and class counsel received more than $2.3 million.[67] Meanwhile, although Facebook agreed to end the Beacon program—which it had actually already ended months before—it remained free to reinstitute the program

as long as it didn't use the name "Beacon."[68] As one federal appellate judge put it (in a dissent from a decision upholding the settlement):

> The majority approves ratification of a class action settlement in which class members get no compensation at all. ***They do not get one cent.*** They do not get even an injunction against Facebook doing exactly the same thing to them again. ***Their purported lawyers get millions of dollars.*** Facebook gets a bar against any claims any of them might make for breach of their privacy rights. The most we could say . . . is that in exchange for giving up any claims they may have, the exposed Facebook users get the satisfaction of contributing to a charity to be funded by Facebook, partially controlled by Facebook, and advised by a legal team consisting of Facebook's counsel and their own purported counsel whom they did not hire and have never met.[69]

The Supreme Court ultimately declined to review the Ninth Circuit's decision approving the settlement. As Chief Justice Roberts explained in a rare statement addressing the court's denial of certiorari, the objectors had challenged "the particular features of the specific *cy pres* settlement at issue," but in his view had not addressed "more fundamental concerns surrounding the use of such remedies" and the standards that should govern their use. Such concerns, he pointed out, would have to await a future case.[70]

- ***Court reduced attorneys' fees because of lack of benefit to class members.*** The Sixth Circuit upheld a district court's decision to reduce class counsel's requested fees from $5.9 million to $3.2 million in a settlement of a class action involving auto-insurance benefits.[71] In affirming the decision, the Sixth Circuit pointed out that the district court "did not believe that the class members received an especially good benefit [because] Class Counsel chose to pursue a relatively insignificant claim" as opposed to "other potential claims, ...and [they] agreed to a settlement mechanism which yielded a low claims rate[.]"[72] Although the court noted that "the settlement makes available a common fund of $27,651,288.83 less any attorney fee award, costs, and administrative expenses," for individual class member benefits up to a maximum of $199.44, "only a small percent of eligible class members have made claims" totaling approximately $4 million—or 14% of the total common fund available.[73] What is more, class counsel represented in their fee motion that they provided notice to 189,305 class members and received "well over 12,000" claims—in other words, a claims-made rate of just over six percent.[74]

Appendix C: Study Design and Methodology

Identifying the Study Sample

The first step in studying putative class actions was to select a suitable pool of cases. Identifying every putative class action filed during 2009 would be impracticable—not least without extensive resources and staff support.[75] We instead used two commercial publications—the *BNA Class Action Litigation Reporter* and the *Mealey's Litigation Class Action Reporter*—to identify cases for inclusion in the study. These publications cover a wide array of developments in class action litigation, and therefore provide a diverse sample of filed class action complaints. The publications have an incentive to report comparatively more significant class actions out of all class actions filed, without wasting readers' time and attention on minor or obviously meritless suits. If anything, the sample would be skewed in favor of more significant class actions filed by prominent plaintiffs' attorneys—which should be *more meritorious on average* than a sample generated randomly from all class actions filed.

We reviewed issues of BNA and Mealey's published between December 2008 and February 2010 in order to identify cases filed in 2009. The reason for that limitation was the importance of analyzing "modern" cases that were filed after the passage of the Class Action Fairness Act of 2005, but long enough ago to track how the cases have actually progressed and whether they have been resolved. From those publications, we identified a pool of putative class actions brought by private plaintiffs that were either filed in federal court or were removed to federal court from state court in 2009. To begin with, because data about state court cases is much more difficult to obtain, we excluded a number of cases, such as those brought in state court initially (where the BNA or Mealey's report did not mention that the case was removed). We also excluded one case that was removed to federal court and then remanded to state court. This left us with 188 cases.

Nineteen of these eventually became part of eleven other consolidated cases that were also part of our data set—whether under the multidistrict litigation ("MDL") procedure, 28 U.S.C. § 1407, or otherwise (for example, cases are often consolidated when they are pending in the same federal district court). When multiple putative class actions appearing in our data set were consolidated, we treated the consolidated case as a single action to avoid the risk of "overcounting" lawsuits.[76] And when a case in our data set was consolidated with other cases not in our data set, we considered activity reflected on the docket of the "lead" consolidated case that was attributable to the individual case as filed. If after consolidation the case was resolved together with the "lead" case—such that we could not trace outcomes for the individual case separate from the "lead" case—we considered activity attributable to the "lead" case. This approach dovetails with the practical mechanics of consolidation: After cases are consolidated into an MDL, for example, the judge to whom the MDL proceeding is assigned will resolve pretrial motions presented in all the consolidated cases. And more generally, to the extent that courts treat a number of separately filed cases together as a single unit for purposes of adjudication, we have

followed the courts' lead.[77] Excluding the cases that became part of other consolidated cases in our data set left us with 169 cases.

Our next goal was to identify a set of class actions consisting of claims resembling those asserted by consumers—because that is the area under study by the CFPB. We therefore excluded three non-Rule-23 putative class actions brought by the Equal Employment Opportunity Commission.[78] We also excluded nine Fair Labor Standards Act cases.[79] Finally, we excluded nine securities cases, because the stakes and nature of those claims are very different from the claims asserted in consumer class actions, and because they are litigated in a different manner because of the procedural checks imposed by federal laws governing securities litigation.[80] Excluding these 21 EEOC, securities, and FLSA cases had next to no effect on the statistical results of our study.[81]

Accordingly, the statistics about the total number of class actions filed in 2009 are based on a set of 148 putative class actions.

Constructing the Data Set

We identified and coded a number of variables about each case. Using the federal courts' Public Access to Court Electronic Records ("PACER") system, we evaluated the filings on each case's docket. Where criteria for a case could be coded in more than one way, we scrutinized the underlying filings and rulings to determine whether the criteria better fit one or another category. For administrative purposes, we treated September 1, 2013, as the date on which our study period closed. We did not code filings and events that were entered onto the docket after that date.

Among the data collected for each case were: jurisdiction; date filed; plaintiffs' firm; assigned judge; cause of action (as reported by PACER); nature of suit (as reported by PACER); whether the case was a lead or related case (if it was in a consolidated action);[82] whether the court granted class certification; whether the case was voluntarily dismissed,[83] settled, settled but on appeal, dismissed, otherwise disposed of, or still pending; the current posture of the case;[84] and the date of the last action on the case.

For cases involving settlements, we also collected information about the date of dismissal or final settlement approval; the terms of the settlement agreement; any attorneys' fees, expenses, and incentive payments to lead plaintiffs; and the presence of any *cy pres* provision in the settlement agreement.

There are, of course, limitations to the data we collected. First, our conclusions are based on the cases that we reviewed. While there is good reason to believe that generalizations can be made to all class actions, the sample is undoubtedly smaller than the total number of class actions filed in 2009. Attempting to estimate that number reliably—let alone to examine those cases—would have exceeded the scope of our review. On the other hand, the sample includes cases from across the country and is drawn from sources that are likely to report on significant class actions—those that are of comparatively

greater importance or quality than those actions that neither BNA nor Mealey's considered worth reporting. Because the BNA and Mealey's reporters do not present a random sample of all class actions filed in 2009, it would not be useful to calculate a margin of error or otherwise attempt to quantify the extent to which the sample differs randomly from the population of all class actions filed in 2009.

Endnotes

1 For information about our methodology, see Appendix C.

2 *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 445 n.3 (2010) (Ginsburg, J., dissenting).

3 *In re Rhone-Poulenc Rorer Inc.*, 51 F.3d 1293, 1299 (7th Cir. 1995).

4 Hon. Diane Wood, Circuit Judge, Remarks at the FTC Workshop: Protecting Consumer Interests in Class Actions (Sept. 13–14, 2004), in *Panel 2: Tools for Ensuring that Settlements are "Fair, Reasonable, and Adequate,"* 18 Geo. J. Legal Ethics 1197, 1213 (2005).

5 Emery G. Lee III et al., *Impact of the Class Action Fairness Act on the Federal Courts: Preliminary Findings from Phase Two's Pre-CAFA Sample of Diversity Class Actions* at 11 (Federal Judicial Center 2008), http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Preliminary%20Findings%20from%20Phase%20Two%20Class%20Action%20Fairness%20Study%20%282008%29.pdf (discussing 30 such cases).

6 These results are broadly consistent with other studies of class actions. *See, e.g., id.* at 6 (noting that 9% of cases remained pending after at least 3.5 years).

7 *See* Thomas E. Willging & Shannon R. Wheatman, *Attorney Choice of Forum in Class Action Litigation: What Difference Does it Make?*, 81 Notre Dame L. Rev. 591, 635-36, 638 (2006).

8 In one of the cases we studied, the court compelled arbitration of the named plaintiff's claims—a determination that almost always precludes class treatment of the case.

9 Unlike class settlements under Federal Rule of Civil Procedure 23, which must be publicly disclosed and approved by the court, individual settlements of lawsuits in federal court need not be disclosed publicly, nor is court approval required. Typically, parties that agree to settle claims on an individual basis in a lawsuit pending in federal court—whether or not those claims are part of a class action—enter into confidential settlement agreements, a condition of which is that the named plaintiff will voluntarily dismiss his or her individual claims with prejudice; remaining claims that were purported to have been brought on behalf of a class may be dismissed without prejudice with respect to other class members, who may or may not assert the claim in subsequent litigation.

10 *See, e.g.*, Lee et al., *supra* note 5, at 6 (noting that in cases not remanded, 55% of cases were voluntarily dismissed without class certification or class settlement, and another 29% were dismissed by the court).

11 This category includes one case in which the parties have announced a class settlement and sought preliminary approval; five cases in which the court has granted preliminary approval (but has not yet finally approved it); one case that resulted in a settlement to fewer than all plaintiff class members; and two cases in which appeals are pending.

12 Theodore Eisenberg and Charlotte Lanvers, *What is the Settlement Rate and Why Should We Care?*, 6 J. Empir. Leg. Stud. 111, 115 (2009).

13 *Id.* at 133.

14 Hilary Hehman, *Class Certification in California: Second Interim Report from the Study of California Class Action Litigation*, Judicial Council of California: Administrative Office of the Courts, at Tables 01-02 (Feb. 2010), http://www.courts.ca.gov/documents/classaction-certification.pdf (observing that 410 of 1294 resolved cases were settled); *see also* Patricia Hatamyar Moore, *Confronting the Myth of "State Court Class Action Abuses" Through an Understanding of Heuristics and a Plea for More Statistics*, 82 UMKC L. Rev. 133, at 165 & n.192 (2013).

15 *See* 4 *Newberg on Class Actions* § 12:35 (4th ed. 2013) ("[A] common formula in class actions for damages is to distribute the net settlement fund after payment of counsel fees and expenses, ratably among class claimants according to the amount of their recognized transactions during the relevant time period. A typical requirement is for recognized loss to be established by the filing of proofs of claim. . . .").

16 Nicholas M. Pace & William B. Rubenstein, *How Transparent are Class Action Outcomes? Empirical Research on the Availability of Class Action Claims Data* at 3, RAND Institute for Civil Justice Working Paper (July 2008), billrubenstein.com/Downloads/RAND%20Working%20Paper.pdf.

17 *Id.* at 31-32 (explaining that in a survey of class action participants, only 25% of "chief executive officers" at settlement administrators responded to the survey, and even those only "did so solely to inform [the researchers] that the information that they held was 'proprietary' to their clients, namely the attorneys that had hired them to oversee the class action claiming process"); *cf.* Deborah R. Hensler, et al., *Class Action Dilemmas: Pursuing Public Goals for Private Gain* 163-64 (2000) (noting difficulty in obtaining "information about the claiming process and distribution" from a "settlement administrator," who "declined to share distribution figures, suggesting that we talk to the attorneys involved with the case," and noting further that the plaintiffs' and defense attorneys had agreed between themselves "not to discuss or divulge matters related to . . . the actual distribution to the class").

18 *See* Christopher R. Leslie, *The Significance of Silence: Collective Action Problems and Class Action Settlements*, 59 Fla. L. Rev. 71, 93 (2007) (explaining that when a "notice do[es] not estimate the size of the class, . . . class members are unable to calculate their own individual recoveries" and therefore lack "sufficient bases for objecting to the proposed settlement"); *see also Thorogood v. Sears, Roebuck & Co.*, 547 F.3d 742, 744-45 (7th Cir. 2008) (Posner, J.) ("The defendants in class actions are interested in minimizing the sum of the damages they pay the class and the fees they pay the class counsel, and so they are willing to trade small damages for high attorneys' fees. . . . The result of these incentives is to forge a community of interest between class counsel, who control the plaintiff's side of the case, and the defendants. . . . The judge . . . is charged with responsibility for preventing the class lawyers from selling out the class, but it is a responsibility difficult to discharge when the judge confronts a phalanx of colluding counsel.") (citations omitted).

19 Hensler, *supra* note 17, at 165.

20 The lone outlier—a case with a 98.72% claims rate—involved the settlement of an ERISA case involving claims about the Bernie Madoff Ponzi scheme for which potentially enormous claims could be made. The math explains why an "astonishing 98.72%" of the 470 members of the damages class filed claims in this $1.2165 billion settlement. Final Order at 11, *In re Beacon Assoc. Litig.*, No. 09-cv-777 (S.D.N.Y. May 9, 2013), PACER No. 77-2. Because each class member's individual claim was worth, on average, over $2.5 million, it is unsurprising that over 460 of the class members decided to submit a claim. Needless to say, virtually no consumer or employment class actions settle for anything approaching such a large amount per class member.

21 *Sylvester v. CIGNA Corp.*, 369 F. Supp. 2d 34, 52 (D. Me. 2005).

22 Some earlier studies purported to assess the benefits received by class members, but they examined "only what defendants *agreed to pay*" in settlements, rather than "the amounts that defendants *actually paid* after the claims administration process concluded." Brian Fitzpatrick, *An Empirical Study of Class Action Settlements and Their Fee Awards*, 7 J. Empirical Legal Stud. 811, 826 (2010) (emphasis added); *see also* Theodore Eisenberg & Geoffrey Miller, *Attorney's Fees and Expenses in Class Action Settlements: 1993-2008*, 7 J. Empirical Legal Stud. 248, 258-59 (2010) (using same approach).

Moreover, because Fitzpatrick studied only settlements (*see* 7 J. Empircial Legal Stud. at 812), his study failed to take into account that most putative class actions are dismissed or otherwise terminated without any benefits for class members. And Eisenberg and Miller ignored settlements that promised *only* nonpecuniary relief (such as coupons or injunctive relief) to class members. An earlier version of their study—which laid the methodological groundwork for the later expanded study in 2010 (*see id.* at 252)—appears to have counted cases involving such "soft relief" only when it was "included" along with pecuniary relief. Theodore Eisenberg & Geoffrey Miller, *Attorney Fees in Class Action Settlements: An Empirical Study*, 1 J. Empirical Legal Stud. 27, 40 (2004).

23 Plaintiffs' Unopposed Motion for Order Preliminarily Approving Class Action Settlement at 8, *Gianzero v. Wal-Mart Stores, Inc.*, No. 09-cv-00656 (D. Colo. Nov. 21, 2011), PACER No. 464 ("*Gianzero* Preliminary Approval Motion").

24 Plaintiffs' Motion for Preliminary Approval of Class Settlement at 5-7, *In re Chase Bank USA, N.A. "Check Loan" Contract Litigation*, No. 09-md-2032 (N.D. Cal. July 23, 2012), PACER No. 338.

25 *See* notes 44–46 and accompanying text.

26 Revised Class Action Settlement Agreement ¶¶ 20-22, *Bronster v. AOL, LLC*, No. 09-cv-3568 (C.D. Cal. July 31, 2013), PACER No. 66-10. The settlement also proposes a *cy pres* award to a more related charitable organization. *Id.* ¶ 23.

27 Settlement Agreement and Release at 4, *Claridge v. RockYou, Inc.*, No. 09-cv-6032 (N.D. Cal. Dec. 15, 2011), PACER No. 55-1.

28 Notice of Joint Motion for Final Approval of Class Settlement and Memorandum of Points and Authorities in Support Thereof at 4, *Red v. Unilever United States, Inc.*, No. 10-cv-387 (N.D. Cal. June 6, 2011), PACER No. 153.

29 Plaintiffs' Memorandum in Support of Motion for Final Approval of Class Action Settlement at 4-5, *Hohman v. Matrixx Initiatives, Inc.*, No. 09-cv-3693 (N.D. Ill. May 26, 2011), PACER No. 81.

30 *See, e.g., Strong v. BellSouth Telecommunications, Inc.*, 137 F.3d 844, 851 (5th Cir. 1998) (affirming the district court's decision to compare the "actual distribution of class benefits" against the potential recovery, and adjusting the requested fees to account for the fact that a "drastically" small 2.7 percent of the fund was distributed); *see also Int'l Precious Metals Corp. v. Waters*, 530 U.S. 1223, 1223 (2000) (O'Connor, J., respecting the denial of certiorari) (noting that fee awards disconnected from actual recovery "decouple class counsel's financial incentives from those of the class," and "encourage the filing of needless lawsuits where, because the value of each class member's individual claim is small compared to the transaction costs in obtaining recovery, the actual distribution to the class will inevitably be small").

31 *See* Federal Judicial Center, *Manual for Complex Litigation (Fourth)* § 27.71 (2004).

32 *SEC v. Bear Stearns & Co.*, 626 F. Supp. 2d 402, 415 (S.D.N.Y. 2009).

33 Testimony of Martin H. Redish at 7, U.S. House of Representatives, Committee on the Judiciary, Subcommittee on the Constitution, *Hearing: Class Actions Seven Years After the Class Action Fairness Act* (June 1, 2012), available at http://judiciary.house.gov/hearings/Hearings%202012/Redish%2006012012.pdf.

34 *Hoffer v. Landmark Chevrolet Ltd.*, 245 F.R.D. 588, 601-04 (S.D. Tex. 2007) (Rosenthal, J.). In one of the cases in our sample, the same district judge cautioned that *cy pres* awards "'violat[e] the ideal that litigation is meant to compensate individuals who were harmed,'" but ultimately approved the award because prior court precedents had authorized the use of *cy pres*. *In re Heartland Payment Sys., Inc. Customer Data Sec. Breach Litig.*, 851 F. Supp. 2d 1040, 1076 (S.D. Tex. 2012) (Rosenthal, J.).

35 *Gianzero* Preliminary Approval Motion at 4.

36 *Id.* at 10.

37 The Dryer Plaintiffs' Opposition to Preliminary Approval of the Proposed Settlement Class, *Dryer v. Nat'l Football League*, No. 09-cv-2182 (D. Minn. Mar. 20, 2013), PACER No. 264.

38 Alison Frankel, Retired NFL stars reject settlement of their own licensing class action, REUTERS (Mar. 25, 2013), available at http://blogs.reuters.com/alison-frankel/2013/03/25/retired-nfl-stars-reject-settlement-of-their-own-licensing-class-action/.

39 Class Action Complaint at 2, 24-25, *In re Colonial Bancgroup, Inc. ERISA Litig.*, No. 2:09-cv-792 (M.D. Ala. Aug. 20, 2009), PACER No. 1.

40 *See, e.g.*, Final Judgment at 2-3, *In re Colonial Bancgroup, Inc. ERISA Litig.*, No. 2:09-cv-792 (M.D. Ala. Oct. 12, 2012), PACER No. 207 ("*Colonial Bancgroup* Final Judgment").

41 Bill Donahue, *Colonial Bank Execs Pay $2.5m to Dodge ERISA Claims*, Law360 (June 18, 2012), available at http://www.law360.com/articles/350930

42 Plan of Allocation at 3, *In re Colonial Bancgroup, Inc. ERISA Litig.*, No. 2:09-cv-792 (M.D. Ala. Sept. 14, 2012), PACER No. 192-1.

43 *Colonial Bancgroup* Final Judgment at 8.

44 First Amended Complaint at 2, *Turner v. Storm8, LLC*, No. 4:09-cv-05234 (N.D. Cal. June 22, 2010), PACER No. 27.

45 Motion for Final Approval of Class Action Settlement Agreement at 3, *Turner v. Storm8, LLC*, No. 4:09-cv-05234 (N.D. Cal. Nov. 11, 2010), PACER No. 32.

46 Settlement Agreement at 8, *Turner v. Storm8, LLC*, No. 4:09-cv-05234 (N.D. Cal. June 22, 2010), PACER No. 26-1.

47 Attorney's Fees Slashed in Faulty Laptop Class Action, *BNA Class Action Litigation Report*, 14 Class 1497 (Oct. 25, 2013), available at http://news.bna.com/clsn/CLSNWB/split_display.adp?fedfid=37476946&vname=clasnotallissues&jd=a0e2t3w1f0&split=0. This case was among the ones we studied, but the court's decision awarding a reduced amount of attorneys' fees was issued after the closing date of our study.

48 Nicholas M. Pace et al., *Insurance Class Actions in the United States*, Rand Inst. for Civil Just., xxiv (2007), http://www.rand.org/pubs/monographs/MG587-1.html. Another RAND study similarly found that in three of ten class actions, class counsel received more than the class. *See* Deborah R. Hensler et al., *Class Action Dilemmas: Pursuing Public Goals for Private Gain* (Executive Summary), Rand Inst. for Civil Just., 21 (1999), http://www.rand.org/pubs/monograph_reports/MR969.html.

49 *Synfuel Techs., Inc. v. DHL Express (USA), Inc.*, 463 F.3d 646, 648, 650 (7th Cir. 2006) (emphasis added).

50 *Sullivan v. DB Investments, Inc.*, 667 F.3d 273, 329 n. 60 (3d Cir. 2011) (en banc) (emphasis added; quotation marks omitted).

51 Declaration of Kevin Ranlett in Support of Defendants' Amended Motion to Compel Arbitration at 8, *Coneff v. AT&T Corp.*, No. 2:06-cv-00944 (W.D. Wash. May 27, 2009), PACER No. 199. Mr. Ranlett is a Mayer Brown lawyer.

52 *In re Compact Disc Minimum Advertised Price Antitrust Litig.*, 370 F. Supp. 2d 320, 321 (D. Me. 2005).

53 *Yeagley v. Wells Fargo & Co.*, 2008 WL 171083, at *2 (N.D. Cal. Jan. 18, 2008), *rev'd*, 365 F. App'x 886 (9th Cir. 2010).

54 *LaGarde v. Support.com, Inc.*, 2013 WL 1283325, at *6 (N.D. Cal. Mar. 26, 2013). The court approved a proposed modified settlement under which the class members "who made a claim" after having been "offered a $10 cash payment * * * will now receive a $25 cash payment, rather than $10." *Id.* at *4.

55 *In re Apple iPhone 4 Prods. Liab. Litig.*, 2012 WL 3283432, at *1 (N.D. Cal. Aug. 10, 2012).

56 *Union Fid. Life Ins. Co. v. McCurdy*, 781 So. 2d 186, 188 (Ala. 2000).

57 *Palamara v. Kings Family Rests.*, 2008 WL 1818453, at *2 (W.D. Pa. Apr. 22, 2008).

58 *Moody v. Sears, Roebuck & Co.*, 2007 WL 2582193, at *5 (N.C. Super. Ct. May 7, 2007), *rev'd*, 664 S.E.2d 569 (N.C. Ct. App. 2008).

59 *In re Grand Theft Auto Video Game Consumer Litig.*, 251 F.R.D. 139 (S.D.N.Y. 2008).

60 Cheryl Miller, "Ford Explorer Settlement Called a Flop," *The Recorder* (July 13, 2009), http://www.law.com/jsp/article.jsp?id=1202432211252.

61 Michelle Singletary, *Class-action Coupon Settlements are a No-Win for Consumers*, Wash. Post, Apr. 28, 2011 at A14.

62 *Id.*

63 *See* Stipulation of Settlement of Class Action, *Bachman v. A.G. Edwards, Inc.*, No. 22052-01266-03 (Mo. Cir. Ct. St. Louis Feb. 18, 2010), http://www.agedwardsclassactionsettlement.com/bach_20100219094521.pdf; *see also* Daniel Fisher, *Lawyer Appeals Judge's Award of $21 Million in Fees, $8 Coupons for Clients*, FORBES.COM (Jan. 10, 2011), http://blogs.forbes.com/danielfisher/2011/01/10/lawyer-appeals-judges-award-of-21-million-in-fees-8-coupons-for-clients ("The judge didn't even see fit to inquire into the lawyers' valuation of the coupon portion of the settlement, despite strong evidence that less than 10% of coupons in such cases are ever redeemed").

64 Stipulation of Settlement at 2-8, *Weeks v. Kellogg*, No. 2:09-cv-8102 (C.D. Cal. Jan. 10, 2011), PACER No. 121.

65 Memorandum of Law in Support of Plaintiffs' Motion for Award of Attorneys' Fees, Expenses, and Plaintiff Service Awards at 4, *Weeks v. Kellogg*, No. 2:09-cv-8102 (C.D. Cal. July 18, 2011), PACER No. 135-1.

66 *See* Memorandum Opinion at 3-5, 8, *Radosti v. Envision EMI, LLC*, No. 1:09-cv-887 (D.D.C. June 8, 2010), PACER No. 40; Order at 1-2, *Radosti v. Envision EMI, LLC*, No. 1:09-cv-887 (D.D.C. Jan. 19, 2011), PACER No. 45.

67 *Lane v. Facebook, Inc.*, 696 F.3d 811 (9th Cir.), *reh'g en banc den.* 709 F.3d 791 (9th Cir. 2013), *cert. denied*, 134 S. Ct. 8 (2013).

68 Petition for Certiorari at 11-13, *Marek v. Lane*, No. 13-136 (filed July 26, 2013), 2013 WL 3944136.

69 *Lane*, 696 F.3d at 835 (Kleinfeld, J., dissenting) (emphasis added).

70 *Marek*, 134 S. Ct. at 9 (Roberts, C.J., respecting the denial of certiorari).

71 *Van Horn v. Nationwide Prop. & Cas. Ins. Co.*, 436 F. App'x 496 (6th Cir. Aug. 26, 2011).

72 *Id.* at 500.

73 Opinion and Order at 10-11, *Van Horn v. Nationwide Prop. & Cas. Ins. Co.*, No. 1:08-cv-605 (N.D. Ohio, Apr. 30, 2010), PACER No. 308.

74 Class Counsel's Supplemental Memorandum in Support of Class Counsel's Motion for Award of Attorney's Fees and Reimbursement of Litigation Expenses at 3-4, 7, *Van Horn v. Nationwide Prop. & Cas. Ins. Co.*, No. 1:08-cv-605 (N.D. Ohio Mar. 19, 2010), PACER No. 296

75 *See, e.g.*, Deborah Hensler, et al., *Class Action Dilemmas: Pursuing Public Goals for Private Gain* § 4.60 (RAND Institute for Civil Justice, Monograph MR-969/1-ICJ) (1999) ("Enormous methodological obstacles confront anyone conducting research on class action litigation. The first obstacle is a dearth of statistical information. No national register of lawsuits filed with class action claims exists. Until recently, data on the number of federal class actions were substantially incomplete, and data on the number and types of state class actions are still virtually nonexistent. Consequently, no one can reliably estimate how much class action litigation exists or how the number of lawsuits has changed over time. Incomplete reporting of cases also means that it is impossible to select a random sample of all class action lawsuits for quantitative analysis.").

76 By way of example, four cases—*Sansom v. Heartland Payment Sys., Inc.* No. 09-cv-335 (D.N.J.); *Lone Summit Bank v. Heartland Payment Sys., Inc.* No. 09-cv-581 (D.N.J.); *Tricentury Bank v. Heartland Payment Sys., Inc.* No. 09-cv-697 (D.N.J.), and *Kaissi v. Heartland Payment Sys., Inc.* No. 09-cv-540 (D.N.J.)—eventually were consolidated into *In re: Heartland Payment Sys., Inc., Customer Data Security Breach Litigation*, No. 4:09-md-02046 (S.D. Tex.).

77 The decision to treat these consolidated cases along with the lead case had little effect on our data. A comparison of statistics on outcomes reveals that, if anything, treating consolidated class actions as a single action rather than separately tended to overstate the benefits of class actions.

In our full 188-case sample set (including the consolidated cases), 99 cases (54%) were dismissed, whether on the merits by the court, by the plaintiff voluntarily, or as an inferred settlement on an individual basis; 31 cases (16%) remain pending; 55 cases (29%) were settled on a class-wide basis; and 3 cases (2%) were dismissed after the court granted a motion to compel arbitration. By comparison, in the 169-case sample set (excluding the consolidated cases), 99 cases (57%) were dismissed, whether on the merits by the court, by the plaintiff voluntarily, or as an inferred settlement on an individual basis; 23 cases (14%) remained pending; 47 cases (28%) were settled on a class-wide basis; and 1 (1%) was dismissed after the court granted a motion to compel arbitration.

Similarly, this methodology ensures that me-too actions—cases filed by other attorneys after a complaint in a different case, raising materially identical claims—that are routinely dismissed after consolidation without any award or settlement will instead be treated as sharing in any benefits to class members that were actually obtained.

78 The Supreme Court has held that the EEOC may pursue enforcement actions under Title VII § 706 without being certified as a class representative under Federal Rule of Civil Procedure 23. *See Gen. Tel. Co. of Nw., Inc. v. EEOC*, 446 US. 318 (1980). The Supreme Court's reasoning would appear to apply equally outside the context of Title VII. Because the EEOC does not need to pursue a Rule 23 class, the dynamics of EEOC class-wide enforcement actions differ markedly from those in Rule 23 actions.

79 Class actions under the FLSA are certified conditionally as "opt-in" classes. Section 216(b) of the FLSA permits a right of action against an employer by an employee on behalf of "other employees similarly situated," who must have opted in by providing and filing with the court "consent in writing" to become a plaintiff. 29 U.S.C. § 216(b). These cases present different incentives for plaintiffs' counsel than consumer class actions, because they typically involve statutory attorneys' fees to prevailing plaintiffs and may involve large backpay and overtime pay awards.

80 As one academic study explained, securities class actions "are managed under a set of class action rules distinct from those used for other Rule 23(b)(3) classes—and...the plaintiffs with the largest losses have a significant role in the litigation (including choosing class counsel and defining the terms of the settlement) and can hardly be thought of [as] an 'absent' class member." Pace & Rubenstein, *supra* note 16, at 20; *see, e.g.*, Private Securities Litigation Reform Act of 1995, Pub. L. No. 104-76, 109 Stat. 737 (1995); Securities Litigation Uniform Standards Act of 1998, Pub. L. No. 105-353, 112 Stat. 3227 (1998).

81 Recall that our 169-case sample set, which included these cases, resulted in 57% of cases dismissed, 14% pending, 28% settled on a class-wide basis, and 1% dismissed after an order compelling arbitration. *See supra* note 77. After excluding them, our 148-case sample set resulted in 57% of cases dismissed, 14% pending, 28% settled on a class-wide basis, and 1% dismissed after an order compelling arbitration. *See* Figure 1.

82 If a case was a related case in a consolidated action, we collected information based on what happened in the lead case.

83 If a case was voluntarily dismissed, we attempted to discern from filings (and from sources external to the docket) whether the dismissal should be attributed to a settlement on an individual basis—such as when the filings refer to a settlement, or when the named plaintiff sought to dismiss her own claims with prejudice but without prejudice to absent members of the putative class. On one hand, this is likely to understate the rate at which individual plaintiffs settle their claims individually, which in any event results in no recovery to other absent members of the putative class unless another lawsuit moves forward. On the other hand, we were often not able to discern whether the claims in a lawsuit dismissed voluntarily would continue to be litigated (or settled) by another named plaintiff under a different case caption. Thus our decision to select a readily accessible

sample of class actions may understate the extent to which members of a putative class may have their claims dismissed on the merits, or alternatively settled, in a class action under a different docket.

84 The data set includes two certified class actions in which motions for summary judgment are pending. The data set also includes an additional certified class action in which the court granted summary judgment to the plaintiffs on their claim for injunctive relief, and granted summary judgment to the defendants on all remaining claims. At the time our study closed, on September 1, 2013, the parties proposed text for an injunctive order that would resolve the parties' remaining claims on a class-wide basis.

Exhibit 2

Do Class Actions Benefit Class Members? An Empirical Analysis of Class Actions

By Mayer Brown LLP

Data Set of 148 Federal Class Actions Initiated in 2009

The study's[1] statistical analysis of putative class actions filed in 2009 was based on the set of 148 cases listed below.

Case caption	Docket number	District
Koh v. The Coca Cola Company et al	3:09-cv-00182-VRW	N.D. Calif.
Drucker v. Ferrellgas Partners L.P. et al	2:09-cv-02305	D. Kan.
Cinotto v. Delta Air Lines Inc.	1:09-cv-01739-JOF	N.D. Ga.
Schmidt v. AK Steel Corp. Pensions Agreement et al	1:09-cv-00464-SSB-KLL	S.D. Ohio
Heghmann v. Sebelius	1:09-cv-5880-BSJ-GWG	S.D.N.Y.
Patterson et al v. O'Neal	3:09-cv-03031-SC	N.D. Calif.
Sahim v. Dealers Warranty LLC	1:09-cv-4279	N.D. Ill.
Justin Gawronski v. Amazon.com	2:09-cv-01084	W.D. Wash.
Stephens v. Harrah's	2:09-cv-01332-RCJ-RJJ	D. Nev.
Association of New Jersey Chiropractors et al v. Aetna Inc.	3:09-cv-03761-JAP-TJB	D. N.J.
McQuillan v. Proctor & Gamble Manufacturing Company	2:09-cv-13099-DPH-RSW	E.D. Mich.
Joan Gale Frank et al v. The Commonwealth of Antigua and Barbuda	4:09-cv-02217	S.D. Tex.
Dieden v. Reed Elsevier	3:09-cv-03319-MMC	N.D. Calif.
Hobson v. DuPont and Co.	3:09-cv-00474-JRS	E.D. Va.
Green v. KBR Inc.	4:09-cv-00459-GKF-PJC	N.D. Okla.
Williams v. Geithner	0:09-cv-01959-ADM-JJG	D. Minn.
Glisick v. Philip Morris USA Inc	2:09-cv-02413-JAR-GLR	D. Kan.
Horowitz v. AIG Int'l Grp., Inc.	1:09-cv-07312-PAC	S.D.N.Y.
Hickman v. Wells Fargo Bank N.A.	1:09-cv-05090	N.D. Ill.

[1] Mayer Brown LLP, *Do Class Actions Benefit Class Members? An Empirical Analysis of Class Actions* (December 2013), online at http://www.mayerbrown.com/files/uploads/Documents/PDFs/2013/December/DoClassActionsBenefitClassMembers.pdf.

Diana Zupnik v. Tropicana Products, Inc.	2:09-cv-06130-DSF-CT	C.D. Calif.
Marlene Dijols v. Whirlpool Corporation and Maytag Corporation	0:09-cv-61353-WPD	S.D. Fla.
Samuel Troice, et al v. Proskauer Rose LLP	3:09-cv-01600-N-BL	N.D. Tex.
John F. Dryer et al v. National Football League	0:09-cv-2182-PAM-AJB	D. Minn.
Wall v. Debt Relief Group LLC	5:09-cv-00637-OLG	W.D. Tex
Young v. West Publishing Corp.	1:09-cv-22426-FAM	S.D. Fla.
Rochester Drug Cooperative v. Boehinger Ingelheim international GMbh	09-cv-01088-GLL	W.D. Pa.
McKay v. Colonial BancGroup Inc. et al	2:09-cv-00806-MHT-WC	M.D. Ala.
Carr v. Apple Inc.	1:09-cv-01996-PAG	N.D. Ohio
Sheets v. Textron Inc.	1:09-cv-00412-ML-LDA	D.R.I.
Basco v. Toyota Motor Corp.	2:09-cv-06307-GHK-RZ	C.D. Calif.
Meijer v. Qwest Communications International Inc.	1:09-cv-00162-DME	D. Colo.
Zafarana v. Pfizer Inc	2:09-cv-04026-JCJ	E.D. Pa.
John Lincoln v. Sony Electronics Inc.	2:09-cv-06649-SVW-JC	C.D. Calif.
Anthony Magnone et al v. Accretive LLC et al	2:09-cv-06375-GAF-CW	C.D. Calif.
Bridgewater v. Double Diamond-Delaware Inc.	3:09-cv-1758	N.D. Tex.
Curtis v. Merrill Lynch Pierce Fenner & Smith Inc.	1:09-cv-00740-JAB-LPA	M.D.N.C.
Werbel v. PepsiCo, Inc.	4:09-cv-04456-SBA	N.D. Calif.
Werbel v. Kellogg USA	3:09-cv-04457	N.D. Calif.
Philadelphia Firefighters Union Local No. 22 Health and Welfare Fund et al v. Bayer Healthcare Pharmaceuticals Inc. et al	2:09-cv-04567-HB; 3:09-cv-20071-DRH-PMF (S.D. Ill)	E.D. Pa.
Allen Hale v. Guitar Center Inc. et al	2:09-cv-06897-GW-PJW	C.D. Calif.
Board of Trustees of Buffalo Laborers Security Fund et al v. J.P. Jeanneret Associates Inc. et al	1:09-cv-08362-LBS	S.D.N.Y.
Carr v. Int'l Game Technology	3:09-cv-00584-RCJ-WGC	D. Nev.
Fat Butter Ltd. V. BBVA USA Bancshares Inc.	4:09-cv-03053	S.D. Tex.

Elizabeth Kirts et al v. Green Bullion Financial Services LLC d/b/a Cash4Gold	2:09-cv-07361-SJO-MAN	C.D. Calif.
Moses v. T-Mobile USA Inc., et al	2:09-cv-07430-DDP-OP	C.D. Calif.
Garrett v. Smoking Everywhere, Inc.	2:09-cv-02651-GEB-JFM	E.D. Calif.
Kastroll v. Wynn Resorts Ltd.	2:09-cv-02034-LDG-VCF	D. Nev.
Alice H. Allen et al v. Dairy Farmers of America Inc. et al	5:09-cv-00230-cr	D. Vt.
Seong Bae Choi et al v. Toyota Motor Co. et al.	2:09-cv-08143-JVS-FMO	C.D. Calif.
Halpern v. AARP et al	1:09-cv-02104-RJL	D.D.C.
Lefkus v. Steiner Sports Memorabilia Inc. et al	1:09-cv-08874-PKC	S.D.N.Y.
Loreto v. Procter and Gamble Company	1:09-cv-00815-TSB	S.D. Ohio
Inocencio et al v. Procter & Gamble Company	1:09-cv-00813-TMR	S.D. Ohio
Quigley v. Citigroup Supplemental Plan for Shearson Transfers	1:09-cv-08944-PGG	S.D.N.Y.
Hospital Dr. Pila v. Baxter International Corp.	1:09-cv-06360	N.D. Ill.
Kaing v. Pulte Homes, Inc.	3:09-cv-05057-SC	N.D. Calif.
Ragan v. Advanta Corp.	2:09-cv-04974-CMR	E.D. Pa.
Thomas Oakley, et al v. Verizon Communications, Inc., et al	1:09-cv-09175-CM-MHD	S.D.N.Y.
Furst v. Smith et al	2:09-cv-02336-JWS	D. Ariz.
Stewart v. Jos. A. Bank Clothiers, Inc.	4:09-cv-05348-PJH	N.D. Calif.
Christopher Kearney et al v. Hyundai Motor Company et al	8:09-cv-01298-JST-MLG	C.D. Calif.
Rebecca Swift v. Zynga Game Network Inc et al	3:09-cv-05443-EDL	N.D. Calif.
Hughes et al v. Greentrack Inc. et al	7:09-cv-02335-RDP	N.D. Ala.
Turner v. Storm8, LLC	4:09-cv-05234-CW	N.D. Calif.
Cruise v. Principal Global Investors LLC	1:09-cv-09889-CM	S.D.N.Y.
Noe et al v. Verizon Communications, Inc. et al	3:09-cv-02173-N	N.D. Tex.
Zdziarski et al v. Swanson et al	1:09-cv-07571	N.D. Ill.
Friedman v. Schering-Plough Animal Health	3:09-cv-2945	N.D. Ohio
Coudert v. GE Healthcare, Inc.	5:09-cv-02510-IPJ	N.D. Ala.
Valdez-Marquez v. Netflix, Inc.	5:09-cv-5903-JW	N.D. Calif.

Claridge v. RockYou Inc.	4:09-cv-06032	N.D. Calif.
Smith v. Arrow Trucking Co.	4:09-cv-00810-GKF-PJC	N.D. Okla.
Swetic v. Community National Bank Corp.	8:09-cv-02636-JSM-MAP	M.D. Fla.
Resnick et al v. Walmart.com USA LLC	4:09-cv-00002-PJH	N.D. Calif.
Pension Fund for Hosp. & Health Care Employees Philadelphia & Vicinity v. Austin Capital Mgmt. Ltd.	2:09-cv-00615-PBT	E.D. Pa.
American Medical Ass'n v. Aetna Health Inc.	09-cv-579-FSH-PS	D.N.J.
Irwin v. RBS Worldpay Inc.	1:09-cv-00033-CAP	N.D. Ga.
Krottner v. Starbucks Corp.	2:09-cv-00216-RAJ	W.D. Wash.
David Laakman v. Chase Bank USA, N.A.	2:09-cv-01190-GHK-CW	C.D. Calif.
Parks v. AT&T Mobility LLC et al	5:09-cv-00212-D	W.D. Okla.
Allied Services Division Welfare Fund v. GlaxoSmithKline, PLC	2:09-cv-00730-CMR	E.D. Pa.
NAACP v. Wells Fargo	2:09-cv-01758-AG-MAN	C.D. Calif.
NAACP v. HSBC Mortgage Corp	2:09-cv-01759-AG-AN	C.D. Calif.
Vietnam Veterans of America et al v. Central Intelligence Agency et al	4:09-cv-00037-CW	N.D. Calif.
Samsell et al v. WellPoint, Inc. et al	2:09-cv-00667-FSH-PS	D.N.J.
Vickers, et. al v. Knaug Gips KG	1:09-cv-20510-KMM	S.D. Fla.
Sloan et al v. BorgWarner Flexible Benefits Plans et al	2:09-cv-10918-PDB-MKM	E.D. Mich.
Clow et al. v. Johnson & Johnson Consumer Companies, Inc. et al	1:09-cv-01729	N.D. Ill.
Gianzero et al v. Wal-Mart Stores, Inc.	1:09-cv-00656-REB-BNB	D. Colo.
Lakes Entertainment Inc. v. Milberg LLP, et al.	0:09-cv-00677-JNE-SRN	D. Minn.
Martinelli et al v. Petland, Inc. et al	2:09-cv-0529-DGC	D. Ariz.
Oshinsky v. New York Football Giants, Inc. et al.	2:09-cv-01186-PGS-ES	D.N.J.
Webber v. Sony Corporation of America Inc., et al.	1:09-cv-02557-RPP	S.D.N.Y.
Blanchard et al v. Tennessee Valley Authority	3:09-cv-00009	E.D. Tenn.
Whiting v. AARP and United HealthCare Insurance Co.	1:09-cv-00455-RJL	D.D.C.

Walter v. Level 3 Communications, Inc.	1:09-cv-00658-REB-CBS	D. Colo.
Wolph v. Acer America Corp.	3:09-cv-01314-JSW	N.D. Calif.
Diebold et al v. Northern Trust Investments, N.A. et al	1:09-cv-01934	N.D. Ill.
Sioux Honey Association et al v. Hartford Fire Insurance Co et al	09-141	U.S. Intl. Trade
Rawlings et al v. DairyAmerica, Inc. et al	1:09-cv-00607-AWI-DLB	E.D. Calif.
Sarjent v. Johnson & Johnson Consumer Companies, Inc. et al	1:09-cv-00343-LJM-TAB	S.D. Ind.
Moran v. J.P. Jeanneret Associates Inc.	1:09-cv-00305-RJA	W.D.N.Y.
Smalls v. Pilgrim	2:09-cv-00011-JRG-RSP	E.D. Tex.
Fishman Haygood Phelps Walmsley Wilis & Swanson, L.L.P. v. State Street Corp.	1:09-cv-10533-PBS	D. Mass.
Vieira v. Eli Lilly & Co.	1:09-cv-00495-RLY-DML	S.D. Ind.
Maritime Association-I.L.A. Pension, Retirement Welfare & Vaction Fund v. Meridian Capital Partners Inc.	4:09-cv-01290	S.D. Tex.
Garcia v. Johnson	2:09-cv-01747-JS	E.D. Pa.
Aziz v. Republic of Iraq, et al	1:09-cv-00869-MJG	D. Md.
Bohm et al v. Park West Gallery, Incorporated, et al	2:09-cv-11392-SJM-MJH	E.D. Mich.
Garcia et al v. 3M Company	5:09-cv-01943-RMW	N.D. Calif.
Carol D. Smith v. Wm. Wrigley Jr. Company	0:09-cv-60646-JIC	S.D. Fla.
Brito et al v. The New York City Housing Authority, et al	1:09-cv-01621-RML	E.D.N.Y.
Dailey v. Bank of America Corp.	1:09-cv-00851-JGK	S.D.N.Y.
Gabriel et al v. Nationwide Life Insurance Co.	2:09-cv-00508-JCC	W.D. Wash.
Guanipa v. Chavez	1:09-cv-20999	S.D. Fla.
Vercellono v. Gerber Products Company	2:09-cv-02350-DMC-JAD	D.N.J.
National Franchisee Association v. Burger King Corp., et al	3:09-cv-00940-W-NLS	S.D. Calif
Keller v. Electronic Arts Inc. et al	4:09-cv-01967-CW	N.D. Calif.
Slaughter v. Unilever United States Inc.	2:09-cv-02072-WJM-CCC	D.N.J.
Vining, et al v. Ticketmaster Entertainment, Inc. et al	3:09-cv-02096-FLW-DEA	D.N.J.

FPX, LLC v. Google, Inc.	2:09-cv-00142-JRG	E.D. Tex.
Huey v. General Mills Inc.	2:09-cv-01368-FCD-GGH	E.D. Calif.
Wiley v. Gerber Products Co.	1:09-cv-10099-NMG	D. Mass.
Faherty v. Iovate Health Sciences USA Inc.	1:09-cv-10732-EFH	D. Mass.
Hennigan v. General Electric Company et al	2:09-cv-11912-VAR-MJH	E.D. Mich.
Gordon v. America's Collectibles Network et al	3:09-cv-00206	E.D. Tenn.
Bronster v. AOL, LLC	2:09-cv-03568-CAS-PLA	C.D. Calif.
Mitchell v. Procter & Gamble	2:09-cv-00426-ALM-TPK	S.D. Ohio
Mayer v. Administrative Committee of Smurfit-Stone Container Corp. Retirement Plan	1:09-cv-02984	N.D. Ill.
Allison v. Aetna, Inc.	2:09-cv-02560-LDD	E.D. Pa.
Whisby v. SunTrust Banks Inc	1:09-cv-01493-BBM	N.D. Ga.
Sansom v. Heartland Payment Sys. Inc	3:09-cv-00335-FLW-DEA	D.N.J.
Alfi v. Nordstrom, Inc.	3:09-cv-01249-BEN-CAB	S.D. Calif
Theodore Trapp v. Big Poppa's LLC	2:09-cv-00995-LDG-PAL	D.Nev.
Husby, et al v. Iovate Health Sciences USA Inc, et al	2:09-cv-11930-SJM-VMM	E.D. Mich.
Rosen v. Unilever United States, Inc.	5:09-cv-02563-JW	N.D. Calif.
Pennsylvania Employees Benefit Trust Fund v. Merck & Co., Inc.	2:09-cv-02558-JHS	E.D. Pa.
Pfeil v. State Street Bank and Trust Co.	2:09-cv-12229-DPH-VMM	E.D. Mich.
Board of Trustees of the AFTRA Retirement Fund v. JPMorgan Chase Bank, N.A.	1:09-cv-00686-SAS-DCF	S.D.N.Y.
Sullivan v. McGraw-Hill Cos.	1:09-cv-05450-RJS	S.D.N.Y.
St. Barnabas Hospital, Inc. v. Lundbeck, Inc.	0:09-cv-01375-JNE-JJG	D. Minn.
Merkner et al v. AK Steel Corporation	1:09-cv-00423	S.D. Ohio
Hess v. McNeil-PPC Inc.	9:09-cv-80840-KAM	S.D. Fla.
Geise v. Amazon.com LLC et al.	2:09-cv-00982-RAJ	W.D. Wash.
RootZoo Inc. v. Facebook Inc.	4:09-cv-03043-PJH	N.D. Calif.

Goodman et al. v. Merrill Lynch & Co. Inc. et al.	1:09-cv-05841-SAS	S.D.N.Y.
Hohman et al v. Matrixx Initiatives Inc.	1:09-cv-03693	N.D. Ill.
Daniel E. Owens et al v. Apple, Inc.	3:09-cv-00479	S.D. Ill.

Exhibit 3

U.S. CHAMBER OF COMMERCE

1615 H Street, NW
Washington, DC 20062-2000
www.uschamber.com

December 11, 2013

Consumer Financial Protection Bureau
Attention: Ms. Monica Jackson
1700 G Street NW
Washington, DC 20552

Re: ***Request for Information Regarding Scope, Methods, and Data Sources for Conducting Study of Pre-Dispute Arbitration Agreements,*** **Docket No. CFPB-2012-0017—Supplemental Submission**

Dear Ms. Jackson:

This letter and its appendix are submitted on behalf of the U.S. Chamber of Commerce Center for Capital Markets Competitiveness ("CCMC") and the U.S. Chamber Institute for Legal Reform ("ILR"). The U.S. Chamber of Commerce (the "Chamber") is the world's largest business federation, representing the interests of more than three million companies of every size, sector, and region. The Chamber created CCMC to promote a modern and effective regulatory structure for capital markets to fully function in a 21st century economy. ILR is an affiliate of the Chamber dedicated to making our nation's overall civil legal system simpler, faster, and fair for all participants.

We write regarding the Consumer Financial Protection Bureau's ("Bureau") study, authorized by Section 1028(a) of the Dodd-Frank Act and now underway, concerning pre-dispute arbitration agreements in consumer financial contracts. Congress provided that the Bureau must conduct a study of pre-dispute arbitration agreements as a prerequisite to any proposed regulation. Specifically, any "prohibit[ion] or impos[ition of] conditions or limitations" on arbitration must be supported by a finding "that such a prohibition or imposition of conditions or limitations is in the public interest and for the protection of consumers. The findings in such rule *shall be consistent with the study* conducted under subsection (a)."[1] Stated

[1] 12 U.S.C. § 5518(b) (emphasis added).

another way, the Bureau cannot regulate arbitration without conducting an appropriate study, and any proposed regulations must be based on and supported by that study.

Arbitration is an important means of resolving disputes that provides extremely significant benefits to consumers and businesses. As we have previously explained in comments submitted to the Bureau,[2] arbitration of consumer disputes has been common practice for decades; there are perhaps hundreds of millions of consumer contracts currently in force that include arbitration agreements—many of them relating to consumer financial products or services.

The Bureau initially requested comment on how it should conduct the study. A number of commenters—including CCMC and ILR—suggested topics that should be addressed in the study and, in addition, urged the Bureau to issue a public notice identifying the topics that it had decided to study and requesting public comment regarding those topics.[3]

Unfortunately, the Bureau has done neither—***it has not informed the public of the topics it is studying and it has not solicited information regarding those topics.*** As a result, interested individuals and organizations have had no real opportunity to inform the Bureau of available evidence bearing on the issues the Bureau has decided to study, or to develop additional empirical data relevant to those issues. That failure to enable the public to comment on the subjects of the Bureau's study introduces a critical flaw in the study—and, therefore, will completely undermine any rulemaking that may be undertaken on the basis of the study's findings.[4]

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[2] Letter from David Hirschmann & Lisa Rickard to Matthew Burton & PRA Office, *Re: "Telephone Survey Exploring Consumer Awareness of and Perceptions Regarding Dispute Resolution Provisions in Credit Card Agreements,"* Docket No. CFPB-2013-0016 (Aug. 6, 2013), http://www.regulations.gov/#!documentDetail;D=CFPB-2013-0016-0015 (*Chamber Comment II*); Letter from David Hirschmann & Lisa Rickard to Monica Jackson, *Re: Request for Information Regarding Scope, Methods, and Data Sources for Conducting Study of Pre-Dispute Arbitration Agreements, Docket No. CFPB-2012-0017* (June 12, 2012), *available at* http://www.regulations.gov/#!documentDetail;D=CFPB-2012-0017-0051 (*Chamber Comment I*).

[3] *Chamber Comment I* at 3-5, 10-20.

[4] The Bureau has sought one round of comments regarding a proposed consumer survey of "awareness of dispute resolution provisions in their agreements with credit card providers"—and promised the opportunity for a second round of comments—but only because the Paperwork Reduction Act required it to take that step. *Telephone Survey Exploring Consumer Awareness of and Perceptions Regarding Dispute Resolution Provisions in Credit Card Agreements*, Docket No. CFPB-2013-

In order to try to ameliorate these deep flaws in the Bureau's study plan, ILR and CCMC submit the information in this letter and its attachment, which are designed to help the Bureau assess the relative benefits and costs of different dispute resolution systems. This information makes clear that ***arbitration before a fair, neutral decision maker leads to outcomes for consumers and individuals that are comparable or superior to the alternative—litigation in court—and that are achieved faster and at lower expense.***

This submission by ILR and CCMC is designed to address empirical issues that *should* be at the center of the Bureau's study. Given the near-total absence of information from the Bureau about its study design, however, it is impossible for interested parties to offer information tailored appropriately to the topics the Bureau is studying. In any event, the information we are providing is highly relevant to *any* rational study of the relevant issues.[5]

We focus on several fundamental points:

- Arbitration enables consumers with grievances to obtain redress for the vast majority of disputes they are likely to have—small, individualized claims for which litigation in court is impractical. This access to an inexpensive and simple system of dispute resolution is an extremely significant benefit that is often overlooked entirely in the debate over arbitration.

- For typical consumer disputes that are small and individualized, consumers are highly unlikely to be able to hire an attorney to help navigate the court system.

0016, 78 Fed. Reg. 34352 (June 7, 2013). It is disappointing that the Bureau has devoted such attention to soliciting comment on what presumably is a minor component of the overall study. Indeed, as ILR and CCMC explained in their comment, the consumer survey will not produce any information useful to the study specified by Congress. *See Chamber Comment II* at 11-21.

[5] We again respectfully urge the Bureau to provide the public with at least some transparency regarding its study plan in order to enable interested parties to provide relevant information and prevent the Bureau from producing a study that is fatally flawed because it was produced in an informational vacuum. Soliciting public input would surely benefit the Bureau's work: Although the Bureau possesses or can retain able staff and consultants, there is a great deal of information regarding both judicial litigation and arbitration that either has been developed or (more likely) could be developed that is highly relevant to the Bureau's statutory mandate. A legitimate study process would welcome—and facilitate—the submission of such information.

- Those consumers who do brave the courts find that a hearing on their claims is long delayed by overcrowded dockets in our underfunded courts.

- Arbitration is at least as likely, and often more likely, than litigation in court to result in positive outcomes for consumers, as empirical studies repeatedly have shown.

- Arbitration is more user-friendly and inexpensive than litigating in court—especially when (as is increasingly common) parties agree to include fee-shifting or cost-shifting provisions in their arbitration agreements.

- In addition, arbitration agreements offer fair and simplified procedures for consumers—something that is ensured by the protections of generally-applicable state unconscionability law as well as the due process safeguards of the nation's leading arbitration providers, including the American Arbitration Association and JAMS.

- The arguments advanced by critics of arbitration do not stand up to careful scrutiny.

- Some say that, while they recognize the benefits of arbitration, they believe that parties would be better served if they were precluded from committing to arbitration until after a dispute arises. But permitting only "post-dispute arbitration agreements" is an illusory option that actually would have the effect of eliminating arbitration. As scholars have recognized, without arbitration agreements that commit both sides to a potential dispute to arbitrate *before the dispute arises*, arbitration agreements in fact will be rare indeed—and the result will be that consumers are relegated to the judicial system in precisely those cases where burdensome court procedures and overcrowded courts are likely to stymie their claims.

- Class action proponents decry the fact that arbitration typically takes place on an individual basis. But their defense of class actions rests on purely theoretical arguments about the supposed virtues of that procedural device. In reality, consumer class actions deliver (at best) minimal benefits to most consumers.

- A new empirical assessment of class actions that the Chamber has commissioned demonstrates that the class actions studied provide little or no benefit to consumers.

- None of the class actions studied resulted in a trial or in a judgment for plaintiffs on the merits.

- The overwhelming majority of cases are dismissed voluntarily by the named plaintiffs—either because they decide not to proceed with the case or because they settle out on an individual basis—or are dismissed by courts because they are not legally sustainable. Either way, the result is that class members do not benefit.

- And the remaining minority of class actions that are settled on a class-wide basis usually provide class members with little, if any, tangible benefit. As a result, only a handful of class members—often fewer than 10 percent, and sometimes less than 1 percent—even bother to submit claims for benefits.

- Consumers can pursue their claims without the class action device. As even the dissenting Justices in the Supreme Court's recent decision in *American Express Co. v. Italian Colors Restaurant* expressly recognized, "non-class options abound" for effectively pursuing claims on an individual basis. In particular, many arbitration agreements require businesses to pay all or most of arbitration filing fees, authorize the payment of attorneys' fees and other costs of proof in meritorious cases, and provide incentives for individuals to bring claims. And other, more informal, methods of obtaining economies of scale exist, including the use by multiple claimants of the same attorneys and expert witnesses, where necessary.

- The claim that class procedures should be mandated because class actions provide benefits to consumers therefore is not supported by the reality of class actions outcomes. And, because requiring class procedures would result in the elimination of arbitration—companies would not be willing to absorb the additional costs of arbitration ***and*** the huge legal fees associated with defending class actions—consumers would lose the ability to pursue the myriad

individualized claims that are not practicable to litigate in court. Indeed, the only beneficiaries of such a requirement would be lawyers—both plaintiff's lawyers and defense lawyers—who are the only clear winners in class action litigation.

- In short, any rational assessment of the benefits and costs of arbitration must conclude that prohibiting or regulating arbitration will harm consumers much more than it would benefit them.

I. Arbitration Benefits Consumers By Providing A Fair Means Of Resolving Disputes That Consumers Cannot Practically Litigate In Court.

Arbitration enables consumers, employees, and others with grievances to obtain redress for a large number of claims for which litigation in court is impractical. Arbitration is quicker and less costly, and it is at least as likely to result in positive outcomes for claimants. Indeed, the empirical evidence demonstrates that individuals in arbitration fare ***at least as well as—if not better than***—they would have in court. ***Arbitration thus benefits consumers by providing a fair means of adjudicating claims that would be left without redress in the absence of arbitration.***

A. The Judicial System Is Not A Realistic Means Of Obtaining Redress For Most Injured Consumers.

If the judicial system were free of transaction costs, if every legitimate claimant could obtain legal representation, and if lawsuits were resolved expeditiously, then perhaps the courts could be relied upon as the exclusive means of redress for injured consumers. In fact, of course, today's judicial system falls far short of that ideal; each of these three prerequisites is absent, and the reality of judicial litigation is getting significantly worse each year.

Recourse to the judicial system therefore simply is not a realistic option for most injured consumers. Most claims are individualized and too small to attract the legal representation needed to navigate the complex legal system; costs of litigating are too great; and the courts—even many small claims courts—impose requirements (such as appearing in person during the working day) that make litigating there

burdensome and costly. All of these costs are multiplied by the myriad inefficiencies of the judicial system, including time-consuming procedures, delays and postponements in court appearances, and the like.

1. The Vast Majority of Consumer Claims Cannot as a Practical Matter be Pursued in Court.

Litigation in court is complicated and expensive—non-lawyers need legal representation to have any hope of successfully navigating the judicial system. And even with a lawyer, claims are difficult and time-consuming to litigate.

Most wrongs suffered by consumers are relatively small and individualized—excess charges on a bill, a defective piece of merchandise claim, and the like. These claims are simply too small to justify paying a lawyer to handle the matter and in any event most consumers do not have the resources to do so.

As Justice Breyer has recognized, without arbitration, "the typical consumer who has only a small damages claim (who seeks, say, the value of only a defective refrigerator or television set)" would be left "without any remedy but a court remedy, the costs and delays of which could eat up the value of an eventual small recovery."[6] Thus, for the largest category of injuries suffered by consumers, the choice is "arbitration—or nothing."[7]

In the employment context, for instance, it has been estimated that the potential recovery is too small in 72% of the cases currently resolved using pre-dispute arbitration[8] and in 95% of all potential claims[9] to justify litigation in court and

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[6] *Allied-Bruce Terminix Cos., Inc. v. Dobson*, 513 U.S. 265, 281 (1995).

[7] Theodore J. St. Antoine, *Mandatory Arbitration: Why It's Better Than It Looks*, 41 U. Mich. J.L. Reform 783, 792 (2008) (discussing analogous situation of employees with low-dollar claims).

[8] Jyotin Hamid & Emily J. Mathieu, *The Arbitration Fairness Act: Performing Surgery with a Hatchet Instead of a Scalpel?*, 74 Alb. L. Rev. 769, 785 (2010/2011); *accord*, Lewis L. Maltby, *Out of the Frying Pan, Into the Fire: The Feasibility of Post-Dispute Employment Arbitration Agreements*, 30 Wm. Mitchell L. Rev. 313, 318 (2003); *accord* Steven C. Bennett, *The Proposed Arbitration Fairness Act: Problems And Alternatives*, 67 Disp. Resol J. 32, 37 (2012).

[9] St. Antoine, 41 U. Mich. J.L. Reform at 790.

the retention of counsel. There is no reason to believe that the universe of consumer claims differs.[10]

Such claims do not—and could not—attract lawyers willing to work on a contingency-fee basis. Research demonstrates that lawyers accept contingent-fee cases only if the claim promises both a substantial recovery and a substantial percentage of that recovery as a legal fee. One study reported that a claim must be worth at least $60,000 before a lawyer will consider taking it.[11] In some legal markets, this threshold may be as high as $200,000.[12] The vast majority of consumer claims are so small that they will "not . . . elicit a lawyer's attention."[13]

But the complexities of judicial litigation make it difficult, if not impossible, for most individuals to represent themselves effectively in court. The rules are opaque to non-lawyers, and navigating these obstacles can therefore be burdensome to individuals. The requirement of in-person appearances during the workday compounds the economic burden.

Small-claims courts were developed to make it easier for individuals to proceed without representation, but they do not provide a realistic alternative because state budget cuts have severely hobbled these courts. For example, the *New York Times* reported in 2011 that in New York, night court sessions were being cancelled in many locales, waits had quadrupled, and court officials were unable to work through their overburdened daily dockets, forcing individuals to leave empty-handed, only to return another day in the hope that their disputes will eventually be heard.[14]

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[10] *See, e.g.*, Christopher R. Drahozal & Samantha Zyontz, *An Empirical Study of AAA Consumer Arbitrations*, 25 Ohio St. J. on Disp. Resol. 843, 898 (2010) (noting that "the number of consumers bringing large claims" in consumer arbitration "is small").

[11] Elizabeth Hill, *Due Process at Low Cost: An Empirical Study of Employment Arbitration Under the Auspices of the American Arbitration Association*, 18 Ohio St. J. on Disp. Resol. 777, 783 (2003).

[12] Recommendations of the Minnesota Supreme Court Civil Justice Reform Task Force 10 (Nov. 23, 2011), http://www.mnbar.org/sections/outstate-practice/11-23-11%20Civil%20Justice%20Reform.pdf.

[13] *Id.*

[14] *See* William Glaberson, *Despite Cutbacks, Night Court's Small Dramas Go On*, N.Y. TIMES, June 2, 2011, *available at* http://www.nytimes.com/2011/06/03/nyregion/despite-cutbacks-new-york-small-claims-courts-trudge-on.html.

Similarly, cases filed in San Joaquin County, California's small-claims court in September 2012 had still not been *scheduled* for trials as of May 2013.[15] The court's presiding judge explained: "In our county, if you file a small claims case it simply sits in the proverbial box waiting to get a trial date. Your case sits and goes nowhere. It's not right, but you have to have sufficient resources to get those cases done, and we don't have those resources."[16] Meanwhile, a Texas law that went into effect in August 2013 "abolish[ed] small claims courts across the state, meaning all those small-price-tag cases—seeking no more than $10,000—[would now] be handled by justice of the peace courts, some of which already are buried under dockets teeming with minor civil matters."[17]

2. **Even for Larger Claims, the Court System Provides Significant Delays and High Costs.**

Some claims are large enough to support contingency fees that would attract the interest of lawyers. But the complexity of the litigation system makes litigation costly and—as a result of budget cuts—many courts are simply unable to keep up with their caseloads, leading to extreme delays. Filing fees also have increased, placing further burdens on plaintiffs.

Forty states had to cut funding to their courts in 2010, according to a report by the American Bar Association's "Task Force on the Preservation of the Justice System," which was co-chaired by David Boies and Theodore B. Olson.[18] The President of the ABA stated that "all over this country," state "[c]hief justices are

[15] Emily Green, *Budget Woes Mean Big Delays For Small Claims Courts*, Nat. Pub. Radio, May 15, 2013, *available at* http://www.npr.org/2013/05/17/182640434/budget-woes-mean-big-delays-for-small-claims-courts.

[16] *Id.*

[17] Kiah Collier, *Little-known state law doing away with small claims courts*, Houston Chronicle, June 23, 2013, http://www.houstonchronicle.com/news/houston-texas/houston/article/Little-known-state-law-doing-away-with-small-4616571.php; see also *Adoption of Rules for Justice Court Cases*, Misc. Docket No. 13-9023 (Tex. Feb. 12, 2013), http://supreme.courts.state.tx.us/MiscDocket/13/13902300.pdf.

[18] Am. Bar. Ass'n ("ABA"), *The Growing Crisis of Underfunding State Courts*, Mar. 16, 2011 ("ABA Report"); *see also* G. Alan Tarr, *No Exit: The Financial Crisis Facing State Courts*, 100 Ky. L.J. 786, 787 (2011-2012).

closing the courts one day a week" and "court personnel including judges [are] being furloughed without pay."[19]

These funding problems have continued. Due to "los[ing] about 65% of their general fund support from the state during the last five years," California's court system is subject to even more lengthy delays.[20] As the state's Chief Justice noted in calling on the California Legislature to increase funding to the state judiciary, "[t]he cruel irony is that the economic forces that have led to budget reductions to the courts are the same ones that drive more of our residents to court."[21] And the San Diego County Bar Association warned that "local courts—long the shining example statewide of judicial efficiency—have now been hobbled to such an extent that extensive delays, the closure of courtrooms, the unavailability of essential court services, and long wait times now characterize those court systems instead."[22] These dramatic cutbacks have made it impossible for many courts to keep up with their caseload, leading to extended delays that leave "litigants with no expectation of relief or resolution of their cases for extended periods of time."[23]

As the *Los Angeles Times* reported, "[a]t least 53 courthouses have closed," and "[c]ourts in 20 counties are closed for at least one day a month." These and other "court closures have forced some San Bernardino [county] residents to drive up to 175 miles one way to attend to a legal matter."[24] In New York City, similarly, the wait for a court date is now four times as long as it was before recent budget cuts.[25]

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[19] Wm. T. (Bill) Robinson, *ABA President Robinson Explains Nationwide Crisis in Dwindling Court Budgets*, Aug. 4, 2011 (video).

[20] Maura Dolan, *Budget cuts force California courts to delay trials, ax services*, L.A. Times, Apr. 9, 2013, http://articles.latimes.com/2013/apr/09/local/la-me-court-cutbacks-20130410.

[21] Erin Coe, *California Justice Warns of Looming Case Delays*, Law360, Mar. 9, 2012, *available at* http://www.law360.com/legalindustry/articles/319086.

[22] San Diego County Bar Association, *2013 State of the Judiciary in San Diego County*, https://www.sdcba.org/temp/ts_DAFFCDF9-BDB9-505B-DB71DEEC48C1B816DAFFCE09-BDB9-505B-DF72E0368E012958/CFAC%20Annual%20Report-6-7-2013%5BRS%5D.pdf.

[23] Maura Dolan & Victoria Kim, *Budget cuts to worsen California court delays, officials say*, L.A. Times, July 20, 2011 (quoting Los Angeles County Superior Court Presiding Judge Lee Smalley Edmon), http://articles.latimes.com/2011/jul/20/local/la-me-0720-court-cuts-20110720.

[24] Dolan, *supra* note 20.

[25] *See* Glaberson, *supra* note 14; *see also* Jennifer Golson, *Budget Cuts have 'Widespread' Impact on NY State Courts-Report*, Reuters, Aug. 16, 2011 (quoting Michael Miller of the New York County Lawyers' Association).

Budget cuts led to "shortened hours" in the New York City courts that are a "hardship" for litigants—especially the "economically distressed and working poor people" who face "less flexibility in getting to the court."[26]

In New Hampshire, all civil trials were delayed by a full year to "satisfy speedy trial concerns in criminal proceedings."[27] And the presiding judge of the San Francisco County Superior Court announced: "The civil justice system in San Francisco is collapsing. We will prioritize criminal, juvenile and other matters that must, by law, be adjudicated within time limits. Beyond that, justice will be neither swift nor accessible."[28] Indeed, even before recent budget cuts, the situation could be bleak for litigants. In 2003, for example, caseloads in Minnesota were so heavy that "judges had on average only 120 seconds of court time to spend on each case."[29]

Although the vast majority of civil claims are filed in state courts,[30] the federal courts also have extraordinarily high caseloads, especially at the trial-court level, where the backlogs are particularly severe. [31] The Brennan Center for Justice has found that

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[26] *At a Standstill: Budget Cuts Have Brought New York's Court System to a Crawl*, NYPress.com, Dec. 5, 2012, http://nypress.com/at-a-standstill-budget-cuts-have-brought-new-yorks-court-system-to-a-crawl/.

[27] ABA Report, *supra* note 18; see also Karen Weise, *U.S. Courts Face Backlogs and Layoffs*, Bloomberg Businessweek, Apr. 28, 2011, http://www.businessweek.com/magazine/content/11_19/b4227024878939.htm.

[28] *See* Dan Rivoli, *California Trial Court To Lay Off 200, Close 25 Rooms*, Law360.com, July 18, 2011 (quoting San Francisco County Superior Court Judge Katherine Feinstein), http://www.law360.com/legalindustry/articles/258746/calif-trial-court-to-lay-off-200-close-25-rooms.

[29] Constitution Project, *The Cost of Justice: Budgetary Threats to America's Courts* 6, 2006, http://www.constitutionproject.org/wp-content/uploads/2012/10/36.pdf (citing Minn. Sup. Ct. Chief Justice Kathleen A. Blatz, *2003 State of the Judiciary*, Minn. State Bar Ass'n Annual Convention, June 20, 2003).

[30] State courts reported around 19 million new civil cases filed in 2010, while federal courts reported over 280,000 new civil cases filed that same year. *Compare* National Center for State Courts, Court Statistics Project, *Examining the Work of State Courts: An Analysis of 2010 State Court Caseloads* 3, Dec. 2012, http://www.courtstatistics.org/Other-Pages/~/media/Microsites/Files/CSP/DATA%20PDF/CSP_DEC.ashx (state courts in 2010), with Administrative Office of the U.S. Courts, *Judicial Business of the U.S. Courts 2012*, http://www.uscourts.gov/Statistics/JudicialBusiness/2012/us-district-courts.aspx (federal courts in 2010).

[31] Ruben Castillo, the Chief Judge of the Northern District of Illinois, said that budget constraints have created "a crisis" for U.S. district courts, and that he is essentially being asked: "Which limb do you want amputated?" Michael Tarm, *New Hispanic Chief Judge: Need More Jury Diversity*, Associated Press, July 2, 2013; *see also* Michelle R. Smith & Jesse J. Holland, *Budget cuts cause delays, concern in federal court*, Associated Press, April 25, 2013, http://bigstory.ap.org/article/budget-cuts-cause-delays-concern-federal-court ("Federal budget cuts have caused delays in at least one terror-related court case in New York and prompted a federal judge in Nebraska to say he is 'seriously contemplating' dismissing some criminal cases.").

"the number of pending cases per sitting judge reached an all-time high in 2009 and was higher in 2012 than at any point from 1992-2007. A judge in 1992 had an average of 388 pending cases on his or her docket. By 2012, the average caseload had jumped to 464 cases—a 20 percent increase."[32]

A recent report by the New York County Lawyers' Association noted that the two federal district courts covering New York City, the Southern and Eastern Districts of New York, "and other federal courts were hit with a 10% funding allocation below the Fiscal Year 2012 level."[33] Those constraints led to reductions in a wide range of court services, including staffing furloughs, "curtail[ing] [courts'] hours of operation," and "slower processing of civil and bankruptcy cases."[34] Similarly, as a federal district judge in Massachusetts explained, "[n]ext year, with additional sequester cuts, I predict (but I'm not positive) that we will run out of money for civil juries before the end of the fiscal year. July, August, I'm not sure when but we will run out."[35] And just this year, the federal district court of the Central District of California "announced it [would] severely curtail services at its three courthouses on seven Fridays from April through [August 2013], accepting only mandatory and emergency filings."[36]

These delays can have serious consequences for plaintiffs. A lawyer in Washington state explained, for example, that his civil case was postponed for more than two years because criminal cases—which are subject to constitutional and statutory speedy-trial requirements—had priority. "During that period of time, the

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32 Alicia Bannon, *Federal Judicial Vacancies: The Trial Courts* 5, Brennan Ctr. for Justice, 2013, http://www.brennancenter.org/publication/federal-judicial-vacancies-trial-courts.

33 New York County Lawyers' Association, *Report on the Continuing Effect of Judicial Budget Cuts on The U.S. District Courts for the Southern and Eastern Districts of New York* 3, Sept. 4, 2013, http://www.nycla.org/siteFiles/Publications/Publications1637_0.pdf.

34 *Id.* at 11.

35 Andrew Cohen, *How the Sequester is Holding Up Our Legal System*, The Atlantic, July 12, 2013, http://www.theatlantic.com/national/archive/2013/07/how-the-sequester-is-holding-up-our-legal-system/277704/.

36 *Budget Cuts Start to Hurt Courts*, The BLT: The Blog of Legal Times, Mar. 29, 2013, http://legaltimes.typepad.com/blt/2013/03/budget-cuts-start-to-hurt-courts.html; see also *Amended Notice Re Reduced Service Days*, Central District of California, August 2013, http://www.cacd.uscourts.gov/news/amended-notice-re-reduced-service-days.

defendant corporation ceased doing business and became insolvent; all assets were distributed to others and the judgment which was obtained became worthless."[37]

Budget cuts have also forced courts to supplement their revenue by increasing fees. The Chief Justice of the Minnesota Supreme Court explained: "[A]s part of the effort to close the revenue gap, significantly increased fees were imposed on a wide variety of cases. As a result, it is going to cost more to go to court and to practice law in Minnesota. This is not what we wanted[.]"[38]

Simply put, the situation for litigants in the underfunded and understaffed courts is grim; and because the trend is toward more cutbacks, the situation will likely get worse.

B. Arbitration Provides A Fair And Effective Remedy For The Injured Consumers For Whom The Judicial System Is Not A Realistic Option.

Arbitration has a number of advantages over pursuing litigation in our overburdened court system. To begin with, arbitration offers flexible proceedings at lower cost. And arbitration proceedings are resolved more quickly than proceedings in court.

As we explain below, studies show that consumers who use this efficient dispute-resolution system prevail in arbitration at least as frequently as—and often more frequently than—they do in court. A wealth of scholarship comparing outcomes of consumers' and employees' claims in arbitration and in litigation reveals that arbitration provides a realistic and fair opportunity for individuals to seek justice before a neutral decisionmaker. "[F]rom the individual's perspective, arbitration" has

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[37] Constitution Project, *supra* note 29, at 8 (citing Washington Courts, Bd. for Judicial Admin., Court Funding Task Force, *Justice in Jeopardy: The Court Funding Crisis in Washington State* 36, 2004, http://www.courts.wa.gov/programs_orgs/pos_bja/wgFinal/wgFinal.pdf.

[38] Chief Justice Eric Magnuson, *The State of the Judiciary: 2009 – Building a 21st Century Judiciary*, Bench&Bar of Minn., Aug. 1, 2009, http://mnbenchbar.com/2009/08/the-state-of-the-judiciary-building-a-21st-century-judiciary/.

the distinct advantage of "provid[ing] an affordable forum with superior chances for obtaining a favorable result."[39]

Existing law, moreover, ensures the fairness and neutrality of arbitration proceedings. The Federal Arbitration Act allows states to regulate arbitration agreements under generally applicable state-law contract principles, including unconscionability. To that end, courts regularly refuse to enforce the small minority of arbitration agreements containing what they consider to be unfair provisions—such as limitations on damages that would be available to individuals in court, inconvenient forum-selection rules, biased arbitrator-selection procedures, or prohibitively expensive costs of accessing an arbitral forum.

In addition to courts' oversight of arbitration provisions, the market has supplied arbitration procedures that are fair to all participants. The leading arbitration providers—such as the AAA and JAMS—have implemented rules and policies tailored for the resolution of consumers' and employees' disputes, which provide basic requirements of procedural fairness that provide strong protections for consumers and employers. And after the Supreme Court emphasized the fairness of the arbitration provision at issue in *AT&T Mobility v. Concepcion*,[40] many businesses have adopted similar pro-consumer provisions.

1. **Arbitration's Flexibility and Lower Cost Makes it Much More Accessible than Courts.**

Arbitration is much more user-friendly and inexpensive than litigating in court. "'The advantages of arbitration are many: it is usually cheaper and faster than litigation; it can have simpler procedural and evidentiary rules; it normally minimizes hostility and is less disruptive of ongoing and future business dealings among the parties; it is often more flexible in regard to scheduling of times and places of hearings and discovery devices.'"[41]

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[39] Peter B. Rutledge, *Who Can Be Against Fairness? The Case Against the Arbitration Fairness Act*, 9 Cardozo J. Conflict Resol. 267, 279 (2008)

[40] 131 S. Ct. 1740 (2011).

[41] *Allied-Bruce Terminix*, 513 U.S. at 280 (quoting H.R. Rep. No.97-542, at 13 (1982), *reprinted in* 1982 U.S.C.C.A.N. 765, 777); *see also, e.g.*, *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1749 (2011) ("[T]he informality of arbitral proceedings is itself desirable, reducing the cost and increasing the speed of dispute resolution.").

Under the consumer procedures of the American Arbitration Association, for example, consumers cannot be asked to pay more than $200 in total arbitration costs; businesses shoulder all remaining fees.[42] By comparison, the cost of filing a civil suit in a federal district court has recently risen to $400 or more.[43]

It is no wonder that Justice Ruth Bader Ginsburg has described the AAA's and other providers' consumer arbitration fee structures as "models for fair cost and fee allocation."[44] And studies have long found that in practice, a large percentage of individuals who bring claims in arbitration pay exactly nothing to pursue their claim—no filing fees, no attorney fees.[45]

The costs of presenting a claim in arbitration, moreover, typically are far lower than litigating in court. Indeed, arbitration does not require a personal appearance to secure a judgment; claims can be adjudicated on the papers or on the basis of a telephone conference.[46] Plaintiffs can submit the relevant documents and a common-sense statement of why they are entitled to relief, and can do so without a lawyer. There is no need to wait in line at night court or miss work, only to be forced to return another day if the court is unable to get through its docket.

Moreover, plaintiffs with more complicated claims may retain an attorney to assist them in presenting their case—but the cost is less because of the more informal nature of arbitration procedures. In addition, parties can (and often do) agree to include fee-shifting provisions in their arbitration agreements that make it less expensive to resolve disputes in arbitration. Consider the arbitration provision that

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[42] Am. Arb. Ass'n ("AAA"), *Costs of Arbitration (Including AAA Administrative Fees)* 1, March 1, 2013, https://www.adr.org/cs/idcplg?IdcService=GET_FILE&dDocName=ADRSTAGE2009593&RevisionSelectionMethod=LatestReleased.

[43] Judicial Conference of the United States, *District Courts Miscellaneous Fee Schedule* (approving a $50 "administrative" filing fee on top of the previous $350 filing fee), available at http://www.uscourts.gov/FormsAndFees/Fees/DistrictCourtMiscellaneousFeeSchedule.aspx.

[44] *Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79, 95 (2000) (Ginsburg, J., concurring in part).

[45] Hill, 18 Ohio St. J. on Disp. Resol. at 802 (lower-income employees "paid no forum fees" in 61% of the cases studied; employees also paid no attorneys' fees in 32% of the cases).

[46] AAA, *Consumer Related Disputes Supplementary Procedures* 6, Mar. 1, 2013, https://www.adr.org/cs/idcplg?IdcService=GET_FILE&dDocName=ADRSTAGE2009997&RevisionSelectionMethod=LatestReleased.

the Supreme Court approved in *Concepcion*. As the Court then explained, the Concepcions' claim was "most unlikely to go unresolved" because the arbitration provision at issue provided that AT&T would pay the Concepcions a minimum of $7,500 and twice their attorneys fees if they obtained an arbitration award "greater than AT&T's last settlement offer."[47]

Finally, in contrast to the extreme delays that are typical of our overburdened state and federal courts, consumer arbitrations administered by the American Arbitration Association are typically resolved in four to six months—a huge improvement over the 25.7 months that pass before the average civil lawsuit in federal court first reaches trial (in those rare cases that make it to trial).[48] (Even in 2001—well before the recent rounds of cutbacks—a contract suit tried before a jury took 25 months on average to reach judgment; but now that time frame won't suffice even to begin a trial.[49]) Long delays are a sure-fire way of increasing the transaction costs of dispute resolution.

In short, arbitration gives consumers a practical and accessible way to pursue their disputes far more often than litigating in court would.

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[47] *AT&T Mobility LLC v. Concepcion*, 131 S.Ct. 1740, 1753 (2011) (noting that "aggrieved customers who filed claims would be 'essentially guarantee[d] to be made whole," and that "the District Court concluded that the Concepcions were *better off* under their arbitration agreement with AT&T than they would have been as participants in a class action") (quoting *Laster v. AT&T Mobility LLC*, 584 F.3d 849, 856 n.9 (9th Cir. 2009)).

[48] AAA, *Analysis of the AAA's Consumer Arbitration Caseload*, 2007, http://www.adr.org/aaa/ShowPDF?doc=ADRSTG_004325 ("AAA Caseload Analysis"); *see also* David Sherwyn et al., *Assessing the Case for Employment Arbitration: A New Path for Empirical Research*, 57 Stan. L. Rev. 1557, 1572-73 (2005) ("few dispute the assertion that arbitration is faster than litigation"); *U.S. District Court—Judicial Caseload Profile* (2012), http://www.uscourts.gov/Statistics/FederalCourtManagementStatistics.aspx. *See also, e.g.*, Michael Delikat & Morris M. Kleiner, *An Empirical Study of Dispute Resolution Mechanisms: Where do Plaintiffs Better Vindicate Their Rights?*, 58 Disp. Resol. J. 56, 58 (Nov. 2003 - Jan. 2004); reporting findings that arbitration was 33% faster than analogous litigation); *see also* 23-9 Insurance Times, Apr. 29, 2003, http://www.insurancejournal.com/pdf/InsuranceTimes_20030429_39125.pdf; GAO Report to Congressional Requesters, *Securities Arbitration: Actions Needed to Address Problem of Unpaid Awards* 32 (June 2000), http://www.gao.gov/archive/2000/gg00115.pdf (reporting that the few securities claims to reach a judgment in court took 1,151 days—or over 3 years—on average); FINRA, *Dispute Resolution Statistics, Summary Arbitration Statistics October 2013* http://www.finra.org/arbitrationandmediation/finradisputeresolution/additionalresources/statistics/ ("FINRA Statistics") (arbitration claims closed in 2013 through October were pending only 14.2 months on average).

[49] Bureau of Justice Statistics, *Contract Trials and Verdicts in Large Counties, 2001* 2, Jan. 2005, http://www.bjs.gov/content/pub/pdf/ctvlc01.pdf.

Finally, arbitration is also attractive "from the company's perspective" because it provides a process that is, on average, cheaper than litigation—resolving most consumer or employment complaints quickly and efficiently, to the consumers' or employees' satisfaction—while minimizing unnecessary transaction costs of in-court litigation.[50]

2. Consumers Prevail in Arbitration at Least as Frequently As—and Often More Frequently Than—They Do in Court.

The empirical research reveals that claimants who choose to arbitrate their claims against businesses are at least as likely—if not more likely—to prevail than those who proceed in court.

Data on win rates reveal that consumers and employees obtain relief to their satisfaction in a significant proportion of arbitrations.

- A recent study by scholars Christopher Drahozal and Samantha Zyontz of claims filed with the American Arbitration Association found that consumers win relief 53.3% of the time.[51]
    - Empirical studies that have sampled wide ranges of claims have similarly reported that plaintiffs win in state and federal court approximately 50% of the time.[52]
    - Drahozal and Zyontz also found that "[c]onsumer claimants who bring large claims tend to do better than consumers who bring smaller claims," but that "[i]n both types of cases, the consumer claimant won some relief against the business more than half of the time."[53]

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[50] Maltby, 30 Wm. Mitchell L. Rev. at 317.

[51] Drahozal & Zyontz, 25 Ohio St. J. on Disp. Resol. at 896-904.

[52] *See, e.g.*, Theodore Eisenberg et al., *Litigation Outcomes in State and Federal Courts: A Statistical Portrait*, 19 Seattle U. L. Rev. 433, 437 (1996) (observing that in 1991-92, plaintiffs won 51% of jury trials in state court and 56% of jury trials in federal court, while in 1979-1993 plaintiffs won 50% of jury trials).

[53] Drahozal & Zyontz, 25 Ohio St. J. on Disp. Resol. at 898.

- Prevailing consumer claimants were generally awarded between 42% and 73% of the amount that they claimed—depending on whether they presented a large or small claim and on how the statistics were calculated (mean or median recovery).

- Claimants are able to win not only compensatory damages but also "other types of damages, including attorneys' fees, punitive damages, and interest."[54] In particular, 63.1% of prevailing claimants who sought attorneys' fees were awarded them.[55]

- Moreover, although the study's authors found a higher win rate (83.6%) for businesses that bring claims against consumers, they concluded that this result was attributed to the fact that "businesses tend to bring debt collection actions and other similar cases in which the likelihood of success [on the merits] for the business is high."[56] By contrast, consumers' claims are "much less likely to involve liquidated amounts and more likely to be contested by businesses."[57]

- The study's authors also examined the purported "repeat player" effect, in order to determine the effect on win rates for claimants who pursue arbitration against businesses that appeared in multiple arbitrations before the AAA. Significantly, the authors found that "consumer claimants still recover some amount against both repeat[] and non-repeat businesses over half the time in the case file sample."[58] And when

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[54] *Id.* at 902.

[55] This stands in marked distinction with the "American Rule" that governs attorney's fees in court proceedings. Under that default rule—where not otherwise altered by statute or contract— "each side in civil litigation has ultimate responsibility for its own lawyer's fees," and the losing party does not "pay anything toward the winner's representation." Thomas D. Rowe, Jr., *The Legal Theory of Attorney Fee Shifting: A Critical Overview*, 1982 Duke L. J. 651, 651. Although the American Rule is the norm in our courts, its effect on the parties' incentives to litigate is distorted with respect to class actions, in which a court may award class counsel reasonable fees measured by the "lodestar" time cost of litigating the class action or by a percentage of the common fund or common benefits recovered for the class. *See* Jonathan R. Macey & Geoffrey P. Miller, *The Plaintiffs' Attorney's Role in Class Action and Derivative Litigation: Economic Analysis and Recommendations for Reform*, 58 U. Chi. L. Rev. 1, 3-4 (1991).

[56] Drahozal & Zyontz, 25 Ohio St. J. on Disp. Resol. at 898.

[57] *Id.* at 901.

[58] *Id.* at 909.

consumer claimants "do prevail on their claim" against a repeat-player business, "they are awarded on average an almost identical percent of the amount claimed against repeat[] businesses (52.4%) as against non-repeat businesses (52.0%)."[59] The authors concluded, too, that the minor discrepancy between those win rates "does not necessarily show arbitrator (or other) bias in favor of repeat businesses." Rather, they explained, businesses that repeatedly arbitrate may be better at screening cases ahead of time, allowing them to "settle meritorious claims and arbitrate only weaker claims."[60]

- According to data released by the AAA about consumer claims resolved between January and August 2007, consumers obtained settlements (or otherwise withdrew their disputes from arbitration) in 60 percent of the cases that they brought against businesses and, in the remaining 40 percent, they prevailed roughly half (48 percent) of the time.[61]

- Data released by the independent administrator of Kaiser Foundation Health Plan's arbitration system revealed that nearly half of claimants obtained resolution to their satisfaction through settlement (44% of claimants in closed cases) or through an award to the claimant after a hearing (5%). "The average award was $362,161, the median was $258,913, and the range was from $8,550 to $2,528,570."[62]

- Critics of voluntary arbitration sometimes point to a report from the advocacy group Public Citizen as purported support for their assertions that arbitration is unfair. But the Public Citizen report shows the folly of examining outcomes in arbitration without comparing them to analogous outcomes in court.

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[59] *Id.* at 912.

[60] *Id.* at 913.

[61] *See AAA Caseload Analysis*, *supra* note 48.

[62] Office of the Independent Administrator of the Kaiser Foundation Health Plan Mandatory Arbitration System for Disputes with Health Plan Members, *2012 Annual Report* ii-iii, 2013, http://www.oia-kaiserarb.com/oia/Forms/2012%20Report.pdf.

- Public Citizen examined data about claims in arbitration brought by creditors against consumer debtors, and concluded from a high win rate for creditors that arbitration is biased against consumers. But in creditor cases against consumer debtors, the consumer often does not appear and does not contest the claim, and is therefore liable either because he has defaulted or "because he owes the debt."[63]

- A more rigorous empirical study subsequently showed that "consumers fare better" in debt-collection arbitrations than in litigation in court.[64] In particular, "creditors won some relief in 77.8 percent of the individual AAA debt collection arbitrations and either 64.1 percent or 85.2 percent of the AAA debt collection program arbitrations," depending on how the research parameters were defined.[65] By contrast, in contested court cases creditors won relief against consumers between 80% and 100% of the time, depending on the court. And consumers fared even worse in court when they did not contest the creditor's claim—courts routinely award default judgments against consumers when they fail to show up.[66]

• Professor Peter Rutledge of the University of Georgia has reviewed the empirical studies comparing arbitration and litigation, and concluded that "raw win rates, comparative win rates, comparative recoveries, and comparative recoveries relative to amounts claimed . . . do not support the claim that consumers and employees achieve inferior results in arbitration compared to litigation."[67]

In short, consumers consistently achieve outcomes in arbitration that are comparable or superior to the outcomes in court. Although the Bureau is not directly

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[63] Sarah Rudolph Cole & Theodore H. Frank, *The Current State of Consumer Arbitration*, 15 Disp. Resol. Mag. 30, 31 (Fall 2008).

[64] Christopher R. Drahozal & Samantha Zyontz, *Creditor Claims in Arbitration and in Court*, 7 Hastings Bus. L.J. 77, 97 (Winter 2011).

[65] *Id.* at 91.

[66] *Id.* at 111-16 (Tables D.1-D.5) (comparing creditor claimant wins and consumer respondent wins, in cases without consumer responses).

[67] Peter B. Rutledge, *Whither Arbitration?*, 6 Geo. J.L. & Pub. Pol'y 549, 560 (Summer 2008).

concerned with the use of arbitration in the employment context, it is worth noting that studies of employment arbitration reach the same result: employees in arbitration do as well as, or better than, employees in court. For example:

- A study of 186 plaintiffs who pursued employment arbitration in the securities industry concluded that employees who arbitrate were more likely to win their disputes than employees who litigate in federal court. The study compared the employees' success rate in arbitration to that of 125 employees who litigated discrimination suits to a resolution in the Southern District of New York. The study found that 46% of those who arbitrated won, as compared to only 34% in litigation; the median monetary award in arbitration was higher; only 3.8% of the litigated cases studied ever reached a jury trial; and the arbitrations were resolved 33% faster than in court.[68]

- One study of 200 AAA employment awards concluded that low-income employees brought 43.5% of arbitration claims, most of which were low-value enough that the employees would not have been able to find an attorney willing to bring litigation on their behalf. These employees were often able to pursue their arbitrations without an attorney, and they won their arbitrations at the same rate as individuals with representation.[69]

- A later study of 261 AAA employment awards from the same period found that for higher-income employees, win rates in like cases in arbitration and litigation were essentially equal, as were median damages.[70] The study attempted to compare "apples" to "apples" by considering separately cases that involved and those that did not involve discrimination claims.[71] With respect to

[68] Delikat & Kleiner, 58 Disp. Resol. J. at 58.

[69] Hill, 18 Ohio St. J. on Disp. Resol. at 785-88 (summarizing results of past studies by Lisa Bingham that lacked empirical evidence proving the existence of an alleged "repeat player" and "repeat arbitrator" effect).

[70] Theodore Eisenberg & Elizabeth Hill, *Arbitration and Litigation of Employment Claims: An Empirical Comparison*, 58 Disp. Resol. J. 44, 48, 50 (Nov. 2003-Jan. 2004).

[71] *See id.* at 49. Because prior research had shown that discrimination claimants "fare noticeably worse in litigation [in court] than other claimants" (*id.* at 48), and "civil-rights claims predominat[ed] in the trial group" sample of court cases (*id.* at 49), the study controlled for the makeup of the data set in court cases in order to draw meaningful comparisons. This control was aimed at ensuring that arbitration outcomes would not "look more pro-employee than they should simply based on the makeup of the sample." *Id.* at 49.

discrimination and non-discrimination claims alike, the study found no statistically significant difference in the success rates of higher-income employees in arbitration and in litigation. For lower-income employees, the study did not attempt to draw comparisons between results in arbitration and in litigation, because lower-income employees appeared to lack meaningful access to the courts—and therefore could not bring a sufficient volume of court cases to provide a baseline for comparison.[72]

- Another separate study of the arbitration of employment-discrimination claims concluded that arbitration is "substantially fair to employees, including those employees at the lower end of the income scale," with employees enjoying a win rate comparable to the win rate for employees proceeding in federal court.[73]
- In 2004, the National Workrights Institute compiled all available employment-arbitration studies, and concluded that employees were almost 20% more likely to win in arbitration than in litigated employment cases. It also concluded that in almost half of employment arbitrations, employees were seeking redress for claims too small to support cost-effective litigation. Median awards received by plaintiffs were the same as in court, although the distorting effect of occasional large jury awards resulted in higher average recoveries in litigation.[74]
- Lewis Maltby, a noted employee advocate and current president of the National Workrights Institute, examined a variety of studies and statistics in 1998 and concluded that the litigation system was far less employee-friendly than commonly believed, and that the arbitration system is far ***more*** employee-friendly. Employees in arbitration in the 1993-1995 period won over 63% of their arbitrations, as compared to 14.9% of federal-district-court cases; as a group, employees also fared better in arbitration than in court in terms of

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[72] *Id.* at 45, 47-48.

[73] *See* Elizabeth Hill, *AAA Employment Arbitration: A Fair Forum at Low Cost*, 58 Disp. Resol. J. 9, 13 (May/July 2003) (reporting employee win rate in arbitration of 43 percent); *see also* Eisenberg & Hill, 58 Disp. Resol. J. at 48 tbl. 1 (reporting employee win rate in federal district court during the same time period was 36.4 percent).

[74] National Workrights Institute, *Employment Arbitration: What Does the Data Show?* (2004), https://web.archive.org/web/20090423052708/http://www.workrights.org/current/cd_arbitration.html.

damages received, compared to initial demands.[75] In short, employees who arbitrate prevailed more often that employees who litigate.

As one study published in the *Stanford Law Review* explained in surveying the empirical research, "[w]hat seems clear from the results of these studies is that the assertions of many ***arbitration critics were either overstated or simply wrong.***"[76] There simply is no empirical support for the contention that arbitration leads to unfair or subpar outcomes when compared with litigation in our overcrowded court system. Rather, the overwhelming weight of the available evidence establishes reflects that arbitration allows consumers and employees to obtain redress faster, cheaper, and more effectively than they could in court.

3. Existing Law Protects Consumers Against Unfair Arbitration Procedures and Biased Arbitrators.

Critics of arbitration sometimes claim that consumers are subjected to unfair arbitration procedures. But current law already contains clear and effective protections against unfair arbitration clauses, and state and federal courts consistently strike down those arbitration clauses that transgress those limits.

State contract law has long recognized that "contracts of adhesion"—take-it-or-leave it standard-form agreements that are essential to the efficient operation of our mass-market economy—can be unfair to consumers or employees in some circumstances. The unconscionability doctrine addresses this concern by empowering courts to invalidate contract provisions that are unfair to consumers or employees. ***Unconscionability standards apply to arbitration contracts.*** Section 2 of the Federal Arbitration Act empowers courts to exercise their authority to review arbitration agreements for compliance with generally-applicable state-law contract principles, including unconscionability.

Indeed, just last year in *Marmet Health Care Center, Inc. v. Brown*, the Court recognized that arbitration agreements may be invalidated under unconscionability

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[75] Lewis Maltby, *Private Justice: Employment Arbitration and Civil Rights*, 30 Colum. Hum. Rts. L. Rev. 29 (Fall 1998).

[76] Sherwyn et al., 57 Stan. L. Rev. at 1567 (emphasis added).

standards "that are not specific to arbitration."[77] (Of course, states cannot discriminate against arbitration contracts by subjecting them to different and harsher standards.)

Courts inquire into the fairness of arbitration provisions in the context of particular clauses and cases, but one thing is clear: ***when courts find arbitration provisions unfair to consumers or employees under generally applicable principles, they do not hesitate to invalidate the agreements.*** For example:

- **Courts invalidate contractual limits on damages that can be awarded by an arbitrator:** Courts police arbitration agreements to ensure that consumers and employees retain their substantive rights in arbitration and can seek individual remedies in arbitration to the same extent as they could in court.
    - Thus, a Texas court struck down an arbitration provision that barred the consumers from recovering damages or attorneys' fees under that state's Deceptive Trade Practices—Consumer Protection Act.[78] Another court refused to enforce an arbitration agreement that purported to limit damages to "actual and direct" damages, which would have had the effect of limiting individual remedies under the Home Ownership Equity Protection Act, 15 U.S.C. § 1639.[79] Courts regularly refuse to enforce other damages limitations.[80]
    - Numerous courts have refused to enforce arbitration agreements that prevent an individual from recovering punitive damages.[81]

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[77] 132 S. Ct. 1201, 1204 (2012).

[78] *Venture Cotton Coop. v. Freeman*, 395 S.W.3d 272 (Tex. Ct. App. 2013).

[79] *Mortg. Elec. Registration Sys., Inc. v. Abner*, 260 S.W.3d 351, 352, 355 (Ky. Ct. App. 2008).

[80] *See also Carll v. Terminix Int'l Co.*, 793 A.2d 921 (Pa. Super. Ct. 2002) (striking provision that barred consumers from recovering damages for personal injury); *Stirlen v. Supercuts, Inc.*, 60 Cal. Rptr. 2d 138 (Ct. App. 1997) (striking arbitration agreement that barred all relief other than actual damages for breach-of-contract claims).

[81] *See, e.g., Alexander v. Anthony Int'l, L.P.*, 341 F.3d 256 (3d Cir. 2003); *Woebse v. Health Care & Retirement Corp. of Am.*, 977 So. 2d 630 (Fla. Dist. Ct. App. 2008).

- In addition to these decisions, the Supreme Court recently explained that federal law would likely require invalidating "a provision in an arbitration agreement forbidding the assertion of certain [federal] statutory rights."[82]

- **Courts reject requirements that arbitration take place in inconvenient locations:** Courts carefully and closely scrutinize provisions that require consumers to arbitrate in a particular location.

  - A federal court in Oregon refused to enforce an agreement that would have required an Oregon consumer to travel to California to arbitrate a dispute concerning a debt-relief agreement, and a Virginia trial court struck down an arbitration provision as unconscionable in part because it required consumers who had bought used cars in Virginia to arbitrate their claims in Los Angeles.[83] Many other courts have reached similar conclusions.[84]

- **Courts strike down agreements with biased procedures for selecting the arbitrator:** Courts invalidate arbitration provisions found to deprive consumers or employees of a fair opportunity to participate in the selection of an arbitrator.

  - The U.S. Court of Appeals for the Ninth Circuit recently held that an arbitration agreement was unconscionable and unenforceable when it "would always produce an arbitrator proposed by [the company] in employee-initiated arbitration[s]," and barred selection of "institutional arbitration administrators."[85]

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[82] *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2310 (2013).

[83] *See Willis v. Nationwide Debt Settlement Grp.*, 878 F. Supp. 2d 1208 (D. Or. 2012); *Philyaw v. Platinum Enters., Inc.*, 54 Va. Cir. 364 (Va. Cir. Ct. Spotsylvania Cnty. 2001).

[84] *See, e.g., College Park Pentecostal Holiness Church v. Gen. Steel Corp.*, 847 F. Supp. 2d 807 (D. Md. 2012) (travel from Maryland to Colorado); *Hollins v. Debt Relief of Am.*, 479 F. Supp. 2d 1099 (D. Neb. 2007) (travel from Nebraska to Texas); *Dominguez v. Finish Line, Inc.*, 439 F. Supp. 2d 688 (W.D. Tex. 2006) (severing provision that would have required Texas retail store manager to arbitrate in Indianapolis, Indiana); *Swain v. Auto Servs., Inc.*, 128 S.W.3d 103, 108 (Mo. Ct. App. 2003) (severing provision that would have required Missouri consumer to arbitrate in Arkansas); *Pinedo v. Premium Tobacco Stores, Inc.*, 102 Cal. Rptr. 2d 435 (Ct. App. 2000) (refusing to enforce agreement that would have required Los Angeles employee to travel to Oakland for arbitration).

[85] *Chavarria v. Ralphs Grocery Co.*, 733 F.3d 916, 923-25 (9th Cir. 2013).

- The U.S. Court of Appeals for the Fourth Circuit struck down an arbitration agreement that gave the employer the sole right to create a list of arbitrators from whom the employee could then pick.[86] And a federal district judge in California refused to enforce a provision that would have granted a company sole discretion to choose an "independent and qualified" arbitrator for its consumer disputes because (under the circumstances) there was no guarantee that the arbitrator would be neutral.[87]

- **Contracts imposing excessive costs to access arbitration are struck down**: The Supreme Court explained in *Green-Tree Fin. Corp.-Ala. v. Randolph* that a party to an arbitration agreement may challenge enforcement of the agreement if the claimant would be required to pay excessive filing fees or arbitrator fees in order to arbitrate a claim.[88]

  - Since *Randolph*, courts have aggressively protected consumers and employees who show that they would be forced to bear excessive costs to access the arbitral forum.[89] The Ninth Circuit, for example, recently refused to enforce an arbitration agreement that required the employee to pay an unrecoverable portion of the arbitrator's fees "regardless of the merits of the claim."[90] And the Supreme Court reaffirmed in *American Express v. Italian Colors* that a challenge to an arbitration agreement might be successful if "filing and administrative fees attached to arbitration . . .

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[86] *Murray v. United Food & Commercial Workers Int'l Union*, 289 F.3d 297 (4th Cir. 2002); *see also Hooters of Am., Inc. v. Phillips*, 173 F.3d 933 (4th Cir. 1999).

[87] *Newton v. American Debt Services, Inc.*, 854 F. Supp. 2d 712, 726 (N.D. Cal. 2012); *see also Roberts v. Time Plus Payroll Servs., Inc.*, 2008 WL 376288 (E.D. Pa. Feb. 7, 2008) (refusing to enforce provision that would have given employer sole discretion to select arbitrator, and instead requiring parties to select arbitrator jointly); *see also Missouri ex rel. Vincent v. Schneider*, 194 S.W.3d 853 (Mo. 2006) (invalidating provision giving president of a local home-builder association sole discretion to pick arbitrator for disputes between local home-builders and home buyers).

[88] *Randolph*, 531 U.S. at 90-92.

[89] *See, e.g., Phillips v. Assocs. Home Equity Servs., Inc.*, 179 F. Supp. 2d 840 (N.D. Ill. 2001); *Camacho v. Holiday Homes, Inc.*, 167 F. Supp. 2d 892 (W.D. Va. 2001).

[90] *Chavarria*, 733 F.3d at 923-25.

  - are so high as to make access to the forum impracticable" for a plaintiff.[91]

  - Other courts have reached the same result under state unconscionability law.[92]

- **Arbitration agreements subjecting consumers or employees to unreasonably shortened statutes of limitations are not enforced:** For example, courts have rejected provisions in arbitration agreements that would have required employees to bring claims within six months.[93]

- **Courts invalidate arbitration agreements with "loser pays" provisions:** Courts also protect individuals against arbitration provisions requiring the "loser" of an arbitration to pay the full costs of the arbitration.[94] And courts do not hesitate to invalidate provisions of arbitration agreements that purport to require the consumer to pay for all costs and expenses of the drafting party regardless of who wins.[95]

The vast majority of arbitration provisions do not exhibit these sorts of defects; and the clear trend has been for companies to make arbitration provisions ever more favorable to their customers and employees. But ***when courts find overreaching occurs—in the areas discussed above and many others as well—they have not hesitated to strike down the arbitration provisions.***

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[91] *Am. Express Co.*, 133 S. Ct. at 2310-11.

[92] *See, e.g., Brunke v. Ohio State Home Servs., Inc.*, 2008 WL 4615578 (Ohio Ct. App. Oct. 20, 2008); *Liebrand v. Brinker Rest. Corp.*, 2008 WL 2445544 (Cal. Ct. App. June 18, 2008); *Murphy v. Mid-West Nat'l Life Ins. Co. of Tenn.*, 78 P.3d 766 (Idaho 2003);

[93] *See, e.g., Zaborowski v. MHN Gov't Servs., Inc.*, 2013 WL 1363568 (N.D. Cal. Apr. 3, 2013); *Adler v. Fred Lind Manor*, 103 P.3d 773 (Wash. 2004) (180 days); *see also Gandee v. LDL Freedom Enters., Inc.*, 293 P.3d 1197 (Wash. 2013) (refusing to enforce arbitration agreement in debt-collection contract that required debtor to present claim within 30 days after dispute arose); *Alexander*, 341 F.3d at 256 (same, for an employee); *Stirlen*, 60 Cal. Rptr. 2d at 138 (rejecting provision that imposed shortened one-year statute of limitations).

[94] *See Gandee*, 293 P.3d at 1197; *Alexander*, 341 F.3d at 256; *Sosa v. Paulos*, 924 P.2d 357 (Utah 1996).

[95] *See, e.g., In re Checking Account Overdraft Litig. MDL No. 2036*, 485 F. App'x 403 (11th Cir. 2012); *see also Samaniego v. Empire Today LLC*, 140 Cal. Rptr. 3d 492 (Cal. Ct. App. 2012) (attorneys' fees).

4. The Leading Arbitration Forums Provide Additional Fairness Protections.

The American Arbitration Association (AAA) and JAMS—the nation's leading arbitration service providers—recognize that independence, due process, and reasonable costs to consumers are vital elements of a fair and accessible arbitration system. They therefore adhere to standards that establish basic requirements of procedural fairness that provide strong protections for consumers and employees. Those providers will not administer an arbitration unless the operative clause is consistent with standards for procedural fairness.

The not-for-profit AAA has served the public since 1926. With offices throughout the United States and around the world, it is among the largest providers of alternative dispute resolution.[96] The AAA maintains a roster of over 7,500 impartial arbitrators and mediators with differing areas of expertise and vast experience.[97] Similarly, JAMS is another leading provider of alternative dispute – resolution.[98] JAMS resolves over 10,000 cases each year and maintains hearing locations worldwide.[99] JAMS employs over 300 full-time exclusive neutrals, many of whom are retired judges and attorneys.[100]

- **Claim Initiation Is Simple and the Rules Are Fair.** In order to initiate a claim under the AAA's rules, a claimant must: (1) briefly explain the dispute; (2) list the names and addresses of the consumer and the business; (3) specify the amount of money involved; and (4) state what relief the claimant wants.[101]

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[96] AAA, *Statement of Ethical Principles for the American Arbitration Association, an ADR Provider Organization*, http://www.adr.org/aaa/faces/s/about/mission/ethicalprinciples?_afrLoop=224757641544354&_afrWindowMode=0&_afrWindowId=null#%40%3F_afrWindowId%3Dnull%26_afrLoop%3D224757641544354%26_afrWindowMode%3D0%26_adf.ctrl-state%3D1c22qa5a7n_18.

[97] *Id.*

[98] JAMS, *About JAMS*, http://www.jamsadr.com/aboutus_overview/.

[99] *Id.*

[100] *Id.*

[101] AAA, *Consumer Related Disputes, Supplementary Procedures*, *supra* note 46.

JAMS similarly requires simple, straightforward information from consumers who initiate disputes, and provides an easy-to-complete online form.[102]

- **Financial Burden Largely Falls on Businesses, Not Consumers or Employees.** Through its rules and fee schedules, AAA shifts most of the financial burden of arbitration to businesses and provides refunds of unused fees and unused other services to ease consumers' financial burdens even further. For example, "[i]n cases before a single arbitrator, a nonrefundable filing fee capped in the amount of $200 is payable in full by the consumer when a claim is filed . . . [a] partially refundable fee in the amount of $1,500 is payable in full by the business . . ."[103] Similarly, under JAMS rules, when a consumer initiates arbitration against the company, the consumer is required to pay only $250, and all other costs are left to the company.[104] In other words, both organizations require *companies* to bear most of the burdens of consumer claims—without regard to who initiated the arbitration.

- **Consumers Play a Key Role in Selecting the Arbitrator.** Arbitration providers screen and help appoint arbitrators, providing the parties with an equal role in selecting the arbitrators in individual proceedings. For example, the AAA provides parties seven days to submit any objections to the appointment of an arbitrator from a list provided by the AAA.[105] Likewise, JAMS rules reaffirm that "consumer[s] must have a reasonable opportunity to participate in the process of choosing the arbitrator(s)."[106]

- **Easy-to-Attend Hearings.** For those individuals who want a hearing, the AAA gives the parties an opportunity to have an in-person hearing or, to make

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[102] JAMS, *Arbitration Forms*, http://www.jamsadr.com/arbitration-forms/.

[103] AAA, *Costs of Arbitration (Including AAA Administration Fees)*, https://www.adr.org/cs/idcplg?IdcService=GET_FILE&dDocName=ADRSTAGE2009593&RevisionSelectionMethod=LatestReleased.

[104] JAMS, *JAMS Policy on Consumer Arbitrations Pursuant to Pre-Dispute Clauses Minimum Standards of Procedural Fairness*, http://www.jamsadr.com/consumer-arbitration/.

[105] AAA, *Consumer Related Disputes, Supplementary Procedures* C-4, *supra* note 46.

[106] JAMS, *supra* note 104.

things easier and cheaper, parties may choose to participate by telephone.[107] The JAMS rules also seek to provide individuals with easy service when it comes to hearings. Under the JAMS policy, "consumer[s] must have a right to an in-person hearing in his or her hometown area."[108]

- **Governed by Due Process Protocols.** All the consumer protections in place at the AAA are driven by standards that set out basic requirements for procedural fairness. The AAA's Consumer Due Process Protocol requires independent and impartial arbitrators, reasonable costs, convenient hearing locations, and remedies comparable to those available in court.[109] The AAA will not administer a consumer arbitration unless the arbitration is consistent with the Due Process Protocol.

Likewise, JAMS will administer a pre-dispute arbitration clause between a company and a consumer only if the contract clause complies with "minimum standards of fairness."[110]

5. **Companies Increasingly Are Adopting Consumer-Friendly Arbitration Agreements.**

In the wake of the Supreme Court's decision in *Concepcion*, an increasing number of arbitration agreements include consumer-friendly provisions modeled on the elements of the arbitration agreement upheld in that case.[111]

Companies Shoulder the Costs Of Arbitration. These agreements include provisions making arbitration cost-free to consumers. For example:

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[107] AAA, *Consumer Related Disputes, Supplementary Procedures* C-6, *supra* note 46.

[108] JAMS, *supra* note 104.

[109] AAA, *Consumer Due Process Protocol*, https://www.adr.org/cs/idcplg?IdcService=GET_FILE&dDocName=ADRSTG_005014&RevisionSelectionMethod=LatestReleased.

[110] JAMS, *supra* note 104.

[111] Some of these examples were reported in Myriam Gilles, *Killing Them With Kindness: Examining "Consumer-Friendly" Arbitration Agreements After* AT&T Mobility v. Concepcion, 88 Notre Dame L. Rev. 825 (2012). The author of this study is an academic who has been largely critical of consumer arbitration.

Company	Cost-Sharing Provision	Website (last visited Dec. 10, 2013)
Amazon.com	"Payment of all filing, administration and arbitrator fees will be governed by the AAA's rules. We will reimburse those fees for claims totaling less than $10,000 unless the arbitrator determines the claims are frivolous. Likewise, Amazon will not seek attorneys' fees and costs in arbitration unless the arbitrator determines the claims are frivolous."	http://www.amazon.com/gp/help/customer/display.html/?nodeId=508088
AT&T	"For any non-frivolous claim that does not exceed $75,000, AT&T will pay all costs of arbitration."	http://www.att.com/disputeresolution
BMO Harris Bank	"For any non-frivolous Claim with a value of $75,000 or less, we will pay the filing, administration and arbitrator fees charged by the American Arbitration Association (also referred to in this provision as the 'AAA') in connection with the arbitration."	http://www.bmoharris.com/pdf/global/deposit-agreement.pdf
Dell	"Dell will be responsible for paying any individual consumer's arbitration fees."	http://www.dell.com/learn/us/en/19/terms-of-sale-consumer?c=us&l=en&s=dhs&cs=19
Match.com	"If your claim against Match.com is for less than $1,000, we will pay all fees."	http://www.match.com/registration/arbitrationProcedures.aspx
Microsoft (Office 2013)	"Disputes Involving $75,000 or Less. Microsoft will promptly reimburse your filing fees and pay the AAA's and arbitrator's fees and expenses. If you reject Microsoft's last written settlement offer made before the arbitrator was appointed .	http://www.microsoft.com/en-us/legal/arbitration/office2013.aspx

Company	Cost-Sharing Provision	Website (last visited Dec. 10, 2013)
	. . , your dispute goes all the way to an arbitrator's decision . . ., and the arbitrator awards you more than Microsoft's last written offer, Microsoft will give you three incentives: (i) pay the greater of the award or $1,000; (ii) pay twice your reasonable attorney's fees, if any; and (iii) reimburse any expenses (***including expert witness fees and costs***) that your attorney reasonably accrues for investigating, preparing, and pursuing your claim in arbitration. The arbitrator will determine the amount of fees, costs, and expenses unless you and Microsoft agree on them."	
Sprint	"Sprint will pay for any filing or case management fees associated with the arbitration and the professional fees for the arbitrator's services."	http://shop2.sprint.com/en/legal/legal_terms_privacy_popup.shtml

Expert and Other Costs of Proving Claims In Arbitration Can Be Shifted To Companies. In some very complex cases, it is possible that a consumer or employee might require an expert witness or even complex discovery in order to pursue a claim against a company. Many companies have adopted arbitration provisions that allow for such costs to be shifted to companies if the claimant prevails—***even when the underlying law does not provide for such cost-shifting and cost-shifting therefore would not be available in a judicial lawsuit.***

Company	Bounty Provision	Website (last visited Dec. 10, 2013)
American Express (*e.g.*, Green Card)	"If the arbitrator rules in your favor for an amount greater than any final offer we made before arbitration, the arbitrator's award will include: (1) any money to which you are entitled, but in no case less than $5,000; and (2) any reasonable attorney's fees, costs and expert and other witness fees."	https://web.aexp-static.com/us/content/pdf/cardmember-agreements/green/AmericanExpressGreenCard.pdf
AT&T	"If, after finding in your favor in any respect on the merits of your claim, the arbitrator issues you an award that is greater than the value of AT&T's last written settlement offer made before an arbitrator was selected, then AT&T will: • pay you the amount of the award or $10,000 . . . , whichever is greater; and • pay your attorney, if any, twice the amount of attorneys' fees, and reimburse any expenses (including expert witness fees and costs), that your attorney reasonably accrues for investigating, preparing, and pursuing your claim in arbitration...."	http://www.att.com/disputeresolution
BMO Harris Bank	"If, after finding in your favor on the merits of your Claim(s), the arbitrator issues you an award that is greater than the value of our last written settlement offer made before an arbitrator was selected, then we will . . . pay you the amount of the award or $5,000, whichever is greater (the	http://www.bmoharris.com/pdf/global/deposit-agreement.pdf

Company	Bounty Provision	Website (last visited Dec. 10, 2013)
	"alternative payment"); and . . . pay your attorney, if any, the amount of attorney's fees, and reimburse any expenses ***(including expert witness*** fees and costs reasonably necessary to prove your Claim), that your attorney reasonably incurs for investigating, preparing, and pursuing your Claim in arbitration (the 'attorney payment')." (Emphasis added).	
Electronic Arts	"[I]f we cannot resolve our disputes informally and you are awarded a sum at arbitration greater than EA's last settlement offer to you (if any), EA will pay you 150% of your arbitration award, up to $5000 over and above your arbitration award."	http://tos.ea.com/legalapp/WEBTERMS/US/en/PC/
Microsoft Xbox	"[If y]our dispute goes all the way to an arbitrator's decision (called an 'award'), and the arbitrator awards You more than Microsoft's last written offer, Microsoft will give You three incentives: (i) pay the greater of the award or $1,000; (ii) pay twice Your reasonable attorney's fees, if any; and (iii) reimburse any expenses (***including expert witness fees and costs***) that Your attorney reasonably accrues for investigating, preparing, and pursuing Your claim in arbitration."	http://www.xbox.com/en-US/Legal/xbox-live-contract-terms

Company	Bounty Provision	Website (last visited Dec. 10, 2013)
Sallie Mae (Bar Study Loan)	If: (i) I submit a Claim Notice in accordance with this paragraph on my own behalf (and not on behalf of any other party); (ii) you refuse to provide the relief I request; and (iii) an arbitrator subsequently determines that I was entitled to such relief (or greater relief), the arbitrator shall award me at least $5,100 (not including any arbitration fees and attorneys' fees and costs to which I may be entitled under this Arbitration Agreement or applicable law)."	https://www.salliemae.com/assets/products/library/app_barstudystudentloancoborrower.pdf
Santander Bank	"If: (i) you submit a Claim Notice on your own behalf (and not on behalf of any other party) in accordance with subsection n, and you otherwise comply with subsection n (including its resolution and cooperation provisions); (ii) we refuse to provide you with the relief you request; and (iii) an arbitrator subsequently determines that you were entitled to such relief (or greater relief), the arbitrator shall award you at least $7,500 and will also require us to pay any other fees and costs to which you are entitled."	https://dmob.santanderbank.com/csdlv/Satellite?blobcol=urldata&blobheader=application%2Fpdf&blobheadername1=Content-Disposition&blobheadervalue1=inline%3Bfilename%3DN3353_MK0034_Sept2013_PDAA+Agreement_r4.pdf&blobkey=id&blobtable=MungoBlobs&blobwhere=1354923409319&ssbinary=true

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Company	Bounty Provision	Website (last visited Dec. 10, 2013)
Verizon	"WE MAY . . . MAKE A WRITTEN SETTLEMENT OFFER ANYTIME BEFORE ARBITRATION BEGINS. . . . IF YOU DON'T ACCEPT THE OFFER AND THE ARBITRATOR AWARDS YOU AN AMOUNT OF MONEY THAT'S MORE THAN OUR OFFER BUT LESS THAN $5000, OR IF WE DON'T MAKE YOU AN OFFER, AND THE ARBITRATOR AWARDS YOU ANY AMOUNT OF MONEY BUT LESS THAN $5,000, THEN WE AGREE TO PAY YOU $5,000 INSTEAD OF THE AMOUNT AWARDED. IN THAT CASE WE ALSO AGREE TO PAY ANY REASONABLE ATTORNEYS' FEES AND EXPENSES, REGARDLESS OF WHETHER THE LAW REQUIRES IT FOR YOUR CASE. IF THE ARBITRATOR AWARDS YOU MORE THAN $5000, THEN WE WILL PAY YOU THAT AMOUNT."	http://www.verizonwireless.com/b2c/support/customer-agreement

Arbitration Agreements Adopt Informal Procedures That Make It Easy For Claimants To Pursue Their Disputes. These agreements include provisions enabling consumers to choose whether the dispute should be resolved on the basis of a written submission, a telephonic hearing, or in-person proceedings. For example:

Company	Cost-Sharing Provision	Website (last visited Dec. 10, 2013)
AT&T	"If your claim is for $10,000 or less, we agree that you may choose whether the arbitration will be conducted solely on the basis of documents submitted to the arbitrator, through a telephonic hearing, or by an in-person hearing as established by the AAA Rules."	http://www.att.com/disputeresolution
Match.com	"If you are seeking less than $10,000, the arbitrator will decide the dispute based only upon the parties' written submissions and, if requested by either party, a telephonic hearing. The parties may submit to the arbitrator written statements setting forth their positions no later than 30 days after the arbitrator's appointment. Each party may also submit a rebuttal or supplemental statement within 10 days after initial statements are due. If a telephonic hearing is requested, it will occur within 45 days after the arbitrator's appointment."	http://www.match.com/registration/arbitrationProcedures.aspx
Netflix	"If your claim is for US$10,000 or less, we agree that you may choose whether the arbitration will be conducted solely on the basis of documents submitted to the arbitrator, through a telephonic hearing, or by an in-person hearing as established by the AAA Rules.."	https://signup.netflix.com/TermsOfUse

Company	Cost-Sharing Provision	Website (last visited Dec. 10, 2013)
Skype	"You may request a telephonic or in-person hearing by following the American Arbitration Association ("AAA") rules. In a dispute involving $10,000 or less, any hearing will be telephonic unless the arbitrator finds good cause to hold an in-person hearing instead."	http://download.microsoft.com/download/6/6/5/6653B3EA-BD4F-4E48-900D-4995146615B4/More-Arbitration-Terms-for-Skype.pdf
Ticketmaster	"If your claim is for $10,000 or less, we agree that you may choose whether the arbitration will be conducted solely on the basis of documents submitted to the arbitrator, through a telephonic hearing, or by an in-person hearing as established by the JAMS Rules."	https://m.concerts.livenation.com/ticket/portal/article.do?offset=27&site=tmus&page=tmustandc&article=terms_and_conditions_1&type=BLOGENTRY

6. **Arbitration's Transaction Cost Savings Lead to Lower Prices That Benefit Consumers.**

In addition to these direct benefits from arbitration, consumers also benefit through the systematic reduction of litigation-related transaction costs, which lead to lower prices for products and services.

Businesses face a number of costs in bringing their products and services to market. In addition to labor, materials, infrastructure, and other costs of running a business, they must absorb the cost of litigating claims related to those products and services. Critically, the costs associated with litigation include not only settlements and judgments resolving meritorious claims brought by plaintiffs, but also the transaction costs of defending against *all* lawsuits, whether or not the plaintiff ultimately prevails on the claim.

The transaction costs associated with judicial litigation are much higher than those incurred in connection with arbitration, for the reasons already discussed. Although arbitration requires businesses to shoulder the costs related to payments to claimants—as shown above, claimants obtain the same or more in arbitration as in litigation—businesses can avoid the higher litigation costs associated with *defending* claims in court.

That enables them to eliminate costs that otherwise would inflate the prices of their products or services. As scholars have noted, "companies . . . include arbitration clauses in their contracts to cut dispute resolution costs and produce savings that they may pass on to consumers through lower prices."[112]

II. The Arguments Advanced By Those Seeking To Prohibit Or Regulate Arbitration Agreements Are Meritless.

Notwithstanding the significant benefits that consumers obtain through arbitration, and the substantial protections in current law and practice against unfair arbitration procedures, some argue that arbitration should be prohibited or restricted in various ways. But the reasons they advance for prohibition or regulation simply do not hold up; and the consequence of their preferred approaches would be the elimination of arbitration agreements, which would deprive consumers of the very significant benefits of arbitration discussed above.

A. Prohibiting Pre-Dispute Arbitration Agreements Would Eliminate Arbitration.

Some critics of arbitration recognize that a generalized attack on alternative dispute resolution flies in the face of ADR's widespread acceptance, especially in light of our overcrowded and overwhelmed court system. To avoid a charge of overt hostility toward alternative dispute resolution, these opponents of arbitration instead frame their attack on "pre-dispute" arbitration agreements—that is, agreements to arbitrate any **future** disputes that might arise between the parties.

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[112] Amy J. Schmitz, *Building Bridges To Remedies For Consumers In International Econflicts*, 34 U. Ark. Little Rock L. Rev. 779, 779–80 (2012); *accord, e.g.*, Bennett, 67 Disp. Resol. J. at 38 n.55; Stephen J. Ware, *The Case for Enforcing Adhesive Arbitration Agreements—With Particular Consideration of Class Actions and Arbitration Fees*, 5 J. Am. Arb. 251, 254–55 (2006).

They assert that post-dispute arbitration agreements—reached after the dispute has already arisen[113]—will provide "a means of correcting the problems" they perceive to exist with arbitration.[114] They assert that "if arbitration is indeed . . . desirable, it will readily be accepted by claimants in the post-dispute setting."[115]

But both the empirical research and leading scholarship on dispute resolution demonstrate that this argument is completely false. Notwithstanding the clear evidence that arbitration is fair, efficient, inexpensive, and good for consumers, business, and employees, the empirical evidence and academic consensus is that ***once a particular dispute arises, the opposing parties will rarely if ever agree to arbitration. Their unwillingness to do so has nothing whatsoever to do with the relative benefits or burdens of arbitration or litigation in court, and instead has everything to do with the practical burdens of administering dual systems and the tactical choices of lawyers in the context of particular cases.***

The post-dispute arbitration agreement is thus an illusion in the consumer and employment contexts. Permitting only post-dispute arbitration agreements therefore would have the real-world consequence of banning arbitration, and depriving consumers of the benefits of arbitration discussed above.

First, "[p]ost-dispute agreements to arbitrate are extremely uncommon."[116] One study found, for instance, that far less than 1% of employment disputes are resolved by post-dispute arbitration *even when a responsible state agency organizes an arbitration program and routinely makes that program available to parties*.[117] A second study found that at most "6% of all employment arbitration[s]" initiated before the

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[113] Although post-dispute agreements to arbitration are often referred to simply as "post-dispute arbitration," that label is obviously a misnomer. *All* arbitration is necessarily "post dispute"; otherwise, there would be nothing to arbitrate. For that reason, we avoid the term "post-dispute arbitration" except when quoting materials that use it.

[114] David Sherwyn, *Because It Takes Two: Why Post-Dispute Voluntary Arbitration Programs Will Fail to Fix the Problems Associated with Employment Discrimination Law Adjudication*, 24 Berkeley J. Emp. & Lab. L. 1, 30 (2003).

[115] Samuel Estreicher, *Saturns for Rickshaws: The Stakes in the Debate over Predispute Employment Arbitration Agreements*, 16 Ohio St. J. on Disp. Resol. 559, 567 (2001) (describing detractors' position and then explaining why it is wrong). Although Estreicher and several of the other authors cited below discuss arbitration in the employment context rather than in the consumer context, their conclusions apply equally to consumer claims.

[116] Hamid & Mathieu, 74 Alb. L. Rev. at 785.

[117] *See* Sherwyn, 24 Berkeley J. Emp. & Lab. L. at 61-62.

American Arbitration Association resulted "from post-dispute agreements,"[118] notwithstanding that a substantial percentage of consumers—60 percent in 2012—settle their claims in arbitration, and that over 45 percent of the consumers who proceed to an arbitral award receive damages.[119]

"[I]n all but the rarest cases," therefore, post-dispute arbitration agreements "will not be offered by one party [and] accepted by the other."[120] Indeed, many employment and consumer contracts do not include pre-dispute arbitration clauses, yet parties to those contracts almost never agree to post-dispute arbitration.[121]

Second, a company that sets up an arbitration program incurs significant administrative costs in connection with carrying out arbitrations—costs that the company does not incur in connection with judicial litigation. For example, under the AAA's Supplementary Procedures for consumer dispute resolution, filing fees are capped at $200 for consumer arbitration—the company must pay up to $1,500.[122] And a company that promises to shift attorneys' or even experts' fees is likely to take on an uncertain but possibly enormous amount of transaction costs.

Companies are willing to incur these costs because, on average, the aggregate costs of resolving disputes in arbitration are lower than the aggregate costs of resolving disputes in litigation in court. And because the company does not know which consumers "will be claimants," it is "likely to offer the [arbitration] program to broad categories of" consumers.[123]

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[118] Maltby, 30 Wm. Mitchell L. Rev. at 314.

[119] *See, e.g.*, FINRA Statistics, *supra* note 48 (50% of FINRA arbitrations closed in 2012 were resolved by direct settlement by the parties, another 10% were resolved by settlement via mediation, and 45% of cases decided by the arbitrator involved an award to the consumer); Cole & Frank, 15 Disp. Resol. Mag. at 32 (finding that consumers "obtained 'favorable results'" in 80% of "consumer-initiated arbitration[s]"); *see also supra* note 51and accompanying text (consumers win relief in 53.3% of the cases they file in arbitrations before the American Arbitration Association).

[120] Estreicher, 16 Ohio St. J. on Disp. Resol. at 567; *see also* Peter B. Rutledge, *Who Can Be Against Fairness? The Case Against the Arbitration Fairness Act*, 9 Cardozo J. Conflict Resol. 267, 279 (2008).

[121] *See* Maltby, 30 Wm. Mitchell L. Rev. at 321 (employment contracts); Peter B. Rutledge & Christopher R. Drahozal, *Contract and Choice*, 2013 B.Y.U. L. Rev. 1, 16-18 & table 1 (2013) (credit card agreements); *see also, e.g.*, Rutledge, 9 Cardozo J. Conflict Resol. at 280 (noting that "an overwhelming majority of [lawyers] would advise their clients not to agree to postdispute arbitration").

[122] See *supra* note 103.

[123] Estreicher, 16 Ohio St. J. on Disp. Resol. at 568.

Well-run arbitration programs are expensive to develop and maintain, meaning that companies will offer them only if they cover most or all possible claims, because only then do they both afford economies of scale and meaningfully manage risk across the set of all potential claimants and claims (both of which are required in order to make consumer-friendly arbitration economically rational for companies).

For that reason, companies will be unwilling to adopt a two-track system of dispute resolution. Faced with the prospect of incurring significant incremental transaction costs in connection with setting up an effective, consumer-friendly arbitration system on one hand, and simultaneously dealing with the risk of the costs of litigating in court, any rational company will choose to minimize those transaction costs. And the only way to do that is to decide not to incur the voluntary incremental costs associated with maintaining an arbitration system, and simply relegate all disputes to the judicial system.

Third, less rational factors contribute to the unwillingness of parties to enter into even mutually beneficial post-dispute agreements to arbitrate. "Disputing parties often have an emotional investment in their respective positions," meaning that "the calculus of litigation (higher cost, but with greater procedural protection) versus arbitration (generally lower cost, but more informal) may" shift after a dispute.[124] One or both parties often feel certain—passionately so—that they are correct and have right, justice, and the law on their side; otherwise, the parties would likely have already settled the case. But that (irrational) certainty causes parties to hold out for multi-tiered court proceedings with layers of appellate review in the (usually vain) hope that, sooner or later, a court will come to see that they are right. Visceral dislike for the opposing side in a dispute—exacerbated by the adversarial nature of court proceedings—also plays a role, as "parties are loathe to agree to anything post-dispute when relationships sour."[125] So, too, do the "falsely negative assumptions about arbitration" held by some consumers,[126] not to mention by many lawyers whose default instincts are to trust the court system, no matter how slow, inefficient, and expensive it might be.

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[124] Bennett, 67-Jul. Disp. Resol. J. at 37.

[125] Schmitz, 34 U. Ark. Little Rock L. Rev. at 785.

[126] *Id.* Schmitz notes that despite this erroneous general perception, consumers who actually participate in arbitrations were "generally satisfied with [those] proceedings." *Id.*

In addition, the lawyers for one or both sides may also be enticed by the fee-generating possibilities of prolonged in-court litigation and may therefore advise clients to choose a forum that is really in the lawyers' own best interest rather than in that of the clients—especially in putative class actions, where named plaintiffs assert little control over the litigation and absent class members have no control whatsoever.[127]

All relevant facts therefore point to only one conclusion: post-dispute arbitration agreements "amount to nothing more than a beguiling mirage."[128] They simply do not—and would not—happen.

A very significant reduction in access to justice would accordingly result from any attempt to foreclose pre-dispute arbitration agreements and to force consumers and companies into only a post-dispute choice between arbitration and litigation. Eliminating the option of pre-dispute arbitration agreements, and thereby eliminating any real possibility of arbitration of consumer claims, would "den[y]" most consumers "access to" any means of pursuing their claims.[129] "[P]re-dispute agreements to arbitrate," which preserve the consumer's right to an affordable forum, accordingly represent the only real-world option for addressing this very significant gap in access to justice provided to consumers by the court system.[130]

B. Class Actions Provide Little Benefit To Consumers And Are Not Needed To Enable Consumers To Vindicate Their Rights Effectively; Requiring Class Procedures Would Harm Consumers By Depriving Them Of The Benefits Of Arbitration.

[127] *See, e.g.*, Eric Goldman, *The Irony of Class Action Litigation*, 10 J. ON TELECOMM. & HIGH TECH. L. 309, 314 (2012) ("[C]lass action lawyers often advance their own financial interests at the expense of the class members' interests.").

[128] St. Antoine, 41 U. Mich. J.L. Reform at 790; *see also* Hamid & Mathieu, 74 Alb. L. Rev. at 785; *see also* Rutledge, 9 Cardozo J. Conflict Resol. at 280 ("[T]he infrequency of postdispute arbitration is . . . attributable to its structural defects.").

[129] Maltby, 30 Wm. Mitchell L. Rev. at 318; *see also* pages 5-12, *supra*.

[130] Theodore J. St. Antoine, *Mandatory Employment Arbitration: Keeping It Fair, Keeping it Lawful*, 60 Case W. Res. L. Rev. 629, 636 (2010).

The principal attack on arbitration stems from the fact that virtually all arbitration agreements require that arbitration proceed on an individual basis and bar class procedures in arbitration and in court.[131] The elimination of class actions, the argument goes, deprives consumers of a procedural mechanism that supposedly provides enormous benefits by allowing the vindication of small claims that (according to the argument) would be too expensive for plaintiffs to arbitrate individually. Therefore, the critics contend, arbitration should be prohibited or, at a minimum, waivers of class procedure should be banned.

In fact, the claims of class action proponents do not match the reality of class actions. A new empirical study of class actions that were filed in 2009 reveals that the overwhelming majority of class actions result in ***no recovery at all for members of the putative class.*** None of the class actions studied went to trial or otherwise resulted in a judgment on the merits for the class. The named plaintiff voluntarily dismissed about one-third of the cases studied, either because the plaintiff chose not to continue with the lawsuit or because he settled his own claim on an individual basis. Another third of the cases were dismissed by a court on the merits. And among the remaining consumer class actions that settle, most offer recoveries to class members that are so small in value—if they offer any monetary recovery at all—that few class members find it worth the effort to submit claims for payment. While information about claims rates are scarce, the evidence that does exist makes it clear that it is commonplace for fewer than 10 percent of consumers—and frequently one percent or less—to realize any tangible benefit from class actions in which their claims are released.

It would be irrational for any policymaker to rest a decision on the theoretical benefits of class actions when the real-world evidence shows that class actions provide little or no benefit, particularly in the consumer context.

Moreover, claimants can effectively vindicate in individual arbitration any claims that might be asserted through class actions. Many arbitration provisions require businesses to pay costs of filing claims, to pay incentive or bonus payments to encourage arbitration of small claims, or to shift the costs associated with proving

[131] In *Concepcion*, the Supreme Court concluded that the Federal Arbitration Act requires the enforcement of agreements to arbitrate on an individual rather than class-wide basis. 131 S. Ct. 1740 (2011).

claims. And a number of other means for obtaining economies of scale—such as sharing the costs of proof across a set of individual arbitrations—are not only authorized by most arbitration agreements, but provide a fully viable model of effective dispute resolution.

The alternatives—prohibiting arbitration altogether or requiring class procedures—would have the same result: elimination of arbitration, because companies would not be willing to incur ***both*** the incremental costs associated with an arbitration system ***and*** the very high litigation costs associated with class procedures. ***That will leave consumers without any means for vindicating the majority of injuries that they suffer—relatively small, individualized claims that cannot practically be asserted in court. Requiring that result to preserve the negligible benefits that class actions actually provide would be a very bad deal for consumers, and for our economy as a whole.***

1. Class Actions Provide Little or No Real Benefit to Consumers.

Proponents of class-action litigation argue that the class device is an effective way for injured individuals to seek recoveries because (in theory) it allows for lawyers to take advantage of economies of scale in representing large numbers of claimants. The reality of class actions falls far short of this promise—***these actions actually deliver little or no relief to consumers.*** Lawyers, both plaintiff's lawyers and defense lawyers, are the principal beneficiaries of these claims.

Although the debate about class action has relied on competing anecdotes, we commissioned an empirical analysis of class actions by Mayer Brown LLP. That study, which examined a sample set of putative consumer and employee class action lawsuits filed in or removed to federal court in 2009, is attached to this letter.[132] The study revealed:

- In the entire data set, ***not one of the class actions ended in a final judgment on the merits for the plaintiffs.*** And none of the class actions went to trial, either before a judge or a jury.

[132] For information about the methodology, see Appendix C to the study.

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- The vast majority of cases produced ***no benefits to most members of the putative class—class***—even though in a number of those cases the lawyers who sought to represent the class often enriched themselves in the process (and the lawyers representing the defendants always did).

    - ***Approximately 14 percent of all class action cases remained pending four years after they were filed***, without resolution or even a determination of whether the case could go forward on a class-wide basis. In these cases, class members have not yet received any benefits—and likely will never receive any, based on the disposition of the other cases we studied.

    - ***Over one-third (35%) of the class actions that have been resolved were dismissed voluntarily by the plaintiff.*** Many of these cases settled on an individual basis, meaning a payout to the individual named plaintiff and the lawyers who brought the suit—***even though the class members receive nothing***. Information about who receives what in such settlements typically isn't publicly available.

    - ***Just under one-third (31%) of the class actions that have been resolved were dismissed by a court on the merits***—again, meaning that class members received ***nothing***.

- ***One-third (33%) of resolved cases were settled on a class basis.***

    - This ***settlement rate is half the average for federal court litigation,*** meaning that a class member is far less likely to have even a chance of obtaining relief than the average party suing individually.

    - ***For those cases that do settle, there is often little or no benefit for class members.***

    - What is more, ***few class members ever even see those paltry benefits—particularly in consumer class actions***. Unfortunately,

because ***information regarding the distribution of class action settlements is rarely available***, the public almost never learns what percentage of a settlement is actually paid to class members. But of the six cases in our data set for which settlement distribution data was public, ***five delivered funds to only miniscule percentages of the class: 0.000006%, 0.33%, 1.5%, 9.66%, and 12%.*** Those results are consistent with other available information about settlement distribution in consumer class actions.

- Although some cases provide for automatic distribution of benefits to class members, automatic distribution almost never is used in consumer class actions—only ***one of the 40*** settled cases fell into this category.

- Some class actions are settled without even the potential for a monetary payment to class members, with the settlement agreement providing for ***payment to a charity or injunctive relief that, in virtually every case, provides no real benefit to class members.***

In short, class actions do not provide class members with anything close to the benefits claimed by their proponents, although they can (and do) enrich attorneys—both on the plaintiffs' and defense side.

The lesson that should be taken from this study: Policymakers who are considering the efficacy of class actions cannot simply rest on a theoretical assessment of class actions or on a handful of favorable anecdotes to justify the value of class actions. Any decision-maker who assumes that class actions are valuable to consumers would have to engage in significant additional empirical research to conclude—contrary to what this study indicates—that class actions actually do provide significant benefits to consumers.

2. **Consumers Can Effectively Vindicate Even Small Claims In Arbitration Without Class Procedures.**

The ***contention that class procedures are essential to permit vindication of small claims was specifically rejected by both the majority and the dissent in the Supreme Court's recent decision*** in ***American Express Co. v. Italian Colors Restaurant.***[133] The dissenting opinion, joined by Justices who also dissented in the *Concepcion* case, specifically identified several different ways in which consumers could effectively vindicate even small claims in arbitration without the use of class action procedures:

> In this case, . . . the [arbitration] agreement could have prohibited class arbitration without offending the effective-vindication rule *if* it had provided an alternative mechanism to share, shift or reduce the necessary costs. The agreement's problem is that it bars not just class actions, but also all mechanisms . . . for joinder or consolidation of claims, informal coordination among individual claimants, or amelioration of arbitral expenses.[134]

In enforcing the arbitration agreement in *Concepcion*, the Supreme Court referenced the lower courts' finding that consumers would be better off in an individual arbitration under the agreement's provisions than in a class action.[135] The *American Express* dissent also identified that procedure as one that permitted the effective vindication of small claims through individual arbitration.

The arbitration provision that the Supreme Court viewed favorably in *Concepcion* contains both (i) incentive/bonus payments designed to encourage the pursuit of small claims, and (ii) the shifting of expert witness costs and attorneys' fees to defendants when the consumer or employee prevails on his or her claim. If a consumer obtains an arbitral award that is greater than the company's last settlement offer, he or she will receive a minimum recovery of $10,000 plus twice the amount of attorneys' fees that his or her counsel incurred for bringing the arbitration. In

[133] 133 S. Ct. 2304 (2013).

[134] *Id.* at 2318 (Kagan, J., dissenting). The majority disagreed with the dissent's claim that the agreement at issue in that case barred informal coordination among individual claimants. *Id.* at 2311 n.4.

[135] *Concepcion*, 131 S. Ct. at 1753.

addition, the company is required to reimburse such a customer for reasonable expert witness fees.

As the dissenters in *American Express* explained, any concerns about whether individuals can vindicate their small claims in arbitration without the class-device are eliminated when an arbitration provision "provide[s] an alternative mechanism to . . . shift . . . the necessary costs."[136] A significant number of companies have adopted bonus/cost-shifting approaches similar to the one approved by the Court in *Concepcion*. The tables at pages 28-34 reflect only a sampling of these arbitration provisions.

The *American Express* dissenters further stated that the concern about cost could be addressed through ***"informal coordination among individual claimants"*** to share the same lawyer, expert, and other elements required to prove the claim.[137] For example, an entrepreneurial plaintiffs' lawyer can recruit large numbers of clients (via the internet, social media, or other similar means), file thousands of individual arbitration demands on behalf of those clients, and distribute common costs over all those claimants, making the costs for expert witnesses and fact development negligible on a per-claimant basis.

Given the low cost, efficiency, and fairness of arbitration, it is no surprise that some plaintiffs' lawyers are already beginning to recognize that pursuing multiple individual arbitrations (or small-claims actions) is an economically viable business model—especially in view of the ability to reach multiple, similarly situated individuals using websites and social media.[138] Indeed, this strategy for spreading fixed litigation costs is an increasingly common means of pursuing disputes in arbitration.

- Counsel for the plaintiffs in *American Express* indicated at a Practicing Law Institute program that if the Supreme Court compelled arbitration the plaintiffs

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[136] *Am. Express*, 133 S. Ct. at 2318 (Kagan, J., dissenting).

[137] *Id.* (emphasis added). The dissent concluded that the American Express arbitration agreement prohibited such cost-sharing, but the majority disagreed, and American Express specifically conceded before the Supreme Court that costs could be shared in this manner. *See id.* at 2311 n.4 (majority).

[138] *See* Carolyn Whetzel & Jessie Kokrda Kamens, *Opt Out's Use of Social Media Against Honda in Small Claims Win Possible "Game Changer,"* Bloomberg BNA Class Action Litig. Rep. (Feb. 10, 2012).

could, and would, pursue their claims through individual arbitrations by using this cost-spreading approach.[139]

- A plaintiff filed a putative class action alleging that AT&T improperly measures the amount of data used by so-called smart devices such as iPhones and iPads, thereby supposedly causing customers to pay more for data usage than they otherwise would. The district court, following the Supreme Court's holding in *Concepcion*, compelled the plaintiff to arbitrate in accordance with his arbitration agreement.[140] Subsequently, counsel for that plaintiff filed separate demands for arbitration on behalf of more than 1,000 claimants—each making virtually identical allegations and relying on the same expert witness whom the original plaintiff had proffered in support of a class-action lawsuit.

- The Internet and social media have made it easier than ever for aggrieved consumers to find each other. One lawyer "set up a website to recruit plaintiffs" to bring multiple small-claims cases alleging marketing of credit information.[141] Similarly, a former lawyer who sued an automaker in small-claims court after opting out of a class action set up a website along with profiles on Twitter and Facebook and a video on YouTube to publicize her case. She was as a result "contacted by hundreds of other car owners seeking guidance in how to file small claims suits if they opted out of" the class action.[142]

- Following the *American Express* ruling, a member of a leading plaintiffs' firm recognized this new approach: "I think you'll continue to see firms like mine move into arbitration. If what large corporations want is to have thousands or

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[139] *See* Gary B. Friedman & Andrew J. Pincus, "Arbitration," Consumer Financial Services Institute 2013, Practicing Law Institute (Apr. 23, 2013), *available at* http://www.pli.edu/Content/OnDemand/Consumer_Financial_Services_Institute_2013/_/N-4nZ1z12p2h?fromsearch=false&ID=158662 (video).

[140] *See Hendricks v. AT&T Mobility LLC*, 823 F. Supp. 2d 1015 (N.D. Cal. 2011).

[141] *See* Sara Foley & Jessica Savage, *Court Filings Boost Revenue*, Corpus Christi Caller Times, Nov. 27, 2010, http://www.caller.com/news/2010/nov/27/court-filings-boost-revenue/

[142] *See* Linda Deutsch, *Honda Loses Small-Claims Suit Over Hybrid MPG*, Associated Press, Feb. 1, 2012, http://www.msnbc.msn.com/id/46228337.ns/business-autos/t/honda-loses-small-claims-suit-over-hybrid-mpg/

tens of thousands of individual arbitrations as opposed to class actions ... then that's the direction we'll go in. It's a bit of 'be careful what you ask for.'"[143]

- At oral argument in *American Express*, Chief Justice John Roberts suggested that plaintiffs could use the resources of a common interest group, such as a small-merchant trade organization, to "get together and say we want to prepare an antitrust expert report" that could be used in each of the subsequent arbitrations.[144]

- In other contexts, the pooling approach has helped plaintiffs lower their individual costs. As one study noted, "[a]n example of how such coordination can work is the large number of individual actions filed in litigation by common counsel for alleged violations of the Fair Debt Collection Practices Act, often against the same defendant."[145] In no small part because the fixed costs of proving a claim against the same defendant may be spread across many plaintiffs—and because attorneys' fees are provided by statute[146]—one newspaper reported that "[h]igh-volume consumer law firms are churning out [FDCPA] lawsuits as efficiently as the collectors they battle."[147]

In short, consumers, employees, and other potential plaintiffs have a wide array of tools for developing litigation resources and strategy that can be leveraged across a number of individual arbitrations. Social media and other technological innovations make it easier than ever for people who have common grievances to find each other and utilize common resources.

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[143] Melissa Lipman, Plaintiff's Lawyers Still Hopeful After AmEx Ruling, LAW360 (June 21, 2013), online at http://www.law360.com/articles/452294/plaintiffs-lawyers-still-hopeful-after-amex-ruling (quoting Jonathan Selbin).

[144] Oral Argument at 20-21, *Am. Express v. Italian Colors Restaurant*, 133 S. Ct. 2304 (No. 12-133), http://www.supremecourt.gov/oral_arguments/argument_transcripts/12-133.pdf.

[145] Gregory C. Cook, *Why* American Express v. Italian Colors *Does Not Matter and Coordinated Pursuit of Aggregate Claims May Be a Viable Option After* Concepcion, 2 Mich. J. L. Reform Online, Apr. 14, 2013, http://www.mjlr.org/2013/04/why-american-express-v-italian-colors-does-not-matter-and-coordinated-pursuit-of-aggregate-claims-may-be-a-viable-option-after-concepcion/#fnref-2132-14 (footnote omitted).

[146] *Id.* (citing 15 U.S.C. § 1692k).

[147] Chris Serres, *Debtors in Court—Suing Collectors*, Minn. Star-Trib., Mar. 17, 2011, http://www.startribune.com/investigators/99676349.html?refer=y.

What is more, there are other ways in which consumers' rights can be vindicated. The Bureau itself can "commence a civil action . . . to impose a civil penalty or to seek all appropriate legal and equitable relief" with respect to a "violat[ion of] a Federal consumer financial law,"[148] which will allow the agency to pursue claims that are properly within the reach of its enforcement authority. And the Bureau has recently issued notice of a proposed Final Rule for its Civil Penalty Fund, which collects penalties imposed in enforcement actions, designating "the conditions under which victims" of Federal consumer financial law violations "will be eligible for payment . . . and the amounts of payments that the Bureau may make to them."[149] The Bureau could use its enforcement authority to seek to vindicate consumers' rights, and the Civil Penalty Fund could be used to augment the opportunity that arbitration provides for consumers to pursue relief. Other federal and state agencies similarly possess a wide range of enforcement authority that can be brought to bear in appropriate circumstances..

In short, there are multiple alternatives to private class action lawsuits in court brought by entrepreneurial plaintiffs' attorneys; these alternatives afford individual consumers actual opportunities to pursue their disputes or otherwise vindicate their rights—in sharp contrast to the false promise of private class actions.

3. Consumer Class Actions Do Not Deter Future Wrongdoing—Deterrence Comes From the Threat of Government Enforcement.

Deterrence theory holds that a party will not engage in wrongdoing if the party believes that it will incur costs for acting wrongfully that it will not incur if it complies with the law. If those costs are incurred without regard to the wrongfulness of the underlying conduct, there is no such deterrent effect.[150] That is the precise flaw in the private class action system.

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[148] 12 U.S.C. § 5564(a).

[149] *Consumer Financial Civil Penalty Fund*, 78 Fed. Reg. 26545, 26546 (2013).

[150] For an analogous discussion of how a failure to distinguish adequately between the culpable and the innocent dilutes the deterrent effect of sanctions in the criminal-law context, see A. Mitchell Polinsky & Steven Shavell, *The Theory of Public Enforcement of Law*, in 1 Handbook of Law and Economics 403, 427-29 (A. Mitchell Polinsky & Steven Shavell eds., 2007).

Plaintiffs' attorneys have little incentive to choose cases based on the merits of the underlying claims—the merits question will never be reached, as the empirical data demonstrates. The plaintiffs' lawyer's goal, rather, is to find a claim for which the complaint can withstand a motion to dismiss and that can satisfy the (legitimately) high hurdles for class certification—standards that do not embody an assessment of the underlying merit of the claim.

Once a class is certified, settlement virtually always follows, driven by the transaction costs (including e-discovery) that such actions impose—which again have little or no correlation to the underlying merits of the case. The class action thus does not impose burdens only on businesses that engage in wrongful conduct. Instead, the burdens of class actions are chiefly a function of who plaintiffs' lawyers choose to sue rather than who has engaged in actual wrongdoing. The threat of a class action therefore cannot—and does not—generally deter wrongful conduct.[151]

Businesses are far more likely to be deterred from wrongdoing by the reputational consequences of engaging in improper behavior, especially because reputational harm is often directly correlated to a business's success or failure. Especially in an age of social media, consumer complaints can quickly go viral, impacting companies immediately and directly leading to changes in practices that garner consumer opposition. Class actions, by contrast, do nothing of the sort.

In sum, deterrence concerns provide no justification for maintaining the availability of private class actions.[152]

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[151] Indeed, to the extent there is any effect associated with class actions, it is likely to deter both lawful and unlawful actions equally—requiring companies to take into account the risk of litigation costs without regard to the legality of the underlying action.

[152] Nor should arbitration be restricted or prohibited because—as some critics of arbitration sometimes contend—arbitration reduces publicly-available precedent. Most court cases are resolved by settlement, and virtually all class actions are settled; these cases offer no real guidance to other parties about what conduct will subject them to or insulate them from a future lawsuit. And most individual consumer cases brought in arbitration could not practically be litigated in court—and therefore would not produce precedent if arbitration did not exist.

Consumer arbitration does not permit companies to conceal their wrongdoing, however. California, the District of Columbia, and several other states have required arbitration providers to publish information about the disposition of arbitration cases. And we are not aware of any arbitration agreement that prohibits a consumer from disclosing the substance of a claim asserted in arbitration and the disposition of that claim. (Arbitration proceedings themselves—the filings of the parties and any oral presentations—are confidential, but that restriction does not preclude parties from publicly discussing the nature of the claims and how they were decided.)

4. **Requiring Class Procedures Would Eliminate Arbitration and Deprive Consumers of Arbitration's Significant Benefits.**

Based on the erroneous assumption that class-wide procedures are necessary to vindicate small-value claims, some critics of arbitration have urged that arbitration agreements should be required to permit either class-wide arbitration or the filing of class actions in court. Like the argument in favor of permitting only "post-dispute arbitration agreements," however, this contention—if accepted—would eliminate consumer arbitration.

As explained above,[153] a company that sets up an arbitration program incurs significant administrative costs—which they are willing to absorb because, on average, the aggregate costs of resolving disputes in arbitration are lower than the aggregate costs of resolving disputes in litigation in court.

If faced with the prospect of incurring significant incremental transaction costs in connection with setting up an effective, consumer-friendly arbitration system on one hand, and simultaneously dealing with the huge costs of litigating class actions in court, all rational companies will choose to minimize those transaction costs.[154] And the only way to do that is to decide not to incur the voluntary incremental costs

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[153] *See supra* pages 37-38.

[154] Indeed, class actions impose particularly large litigation costs unrelated to the merits of the underlying claims. According to a survey of general counsel or senior litigation officers of over 300 companies conducted by Carlton Fields, corporations spend more than $2 billion annually on class action lawsuits. Carlton Fields, *The 2013 Carlton Fields Class Action Survey: Best Practices in Reducing Cost and Managing Risk in Class Action Litigation* 37 (2013), http://www.carltonfields.com/files/uploads/Carlton-Fields-Class-Action-Report-2013-electronic.pdf (compiling 368 "in-depth interviews with general counsel, chief legal officers, and direct reports to general counsel"). In the modern business world, many class actions that are litigated past the pleading stage impose extraordinarily burdensome e-discovery costs, as plaintiffs' lawyers demand e-mails and other electronic files from dozens, if not more, company employees. In fact, a defendant business generally bears the brunt of discovery costs, which can amount to many millions of dollars.

Thus, a recent study by the RAND Institute for Civil Justice of discovery costs in a representative sample of cases found the cost-per-case for producing electronically-stored information ranged from $17,000 to $27 million, with a *median cost of $1.8 million per case.* Nicholas M. Pace & Laura Zakaras, *Where the Money Goes: Understanding Litigant Expenditures for Producing Electronic Discovery* at 17 (RAND Institute for Civil Justice 2012). Class actions obviously would fall at the upper end of that range.

Requiring companies to continue to face these costs would eliminate the transaction cost savings produced by arbitration—with "arbitration plus class actions" a much more costly system than "court litigation alone," companies would chose court litigation. Ware, 5 J. Am. Arb. at 291.

associated with maintaining an arbitration system, and simply relegate all disputes to the judicial system.[155] Indeed, many companies have publicly stated that they would abandon arbitration entirely if the class-action waivers contained in their arbitration agreements are rendered unenforceable.

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Although the proponents of class actions argue that these lawsuits provide a practical mechanism for vindication of consumers' small-value claims, the real-world evidence demonstrates that they do not. As the study of class actions filed in 2009 reveals, few members of putative classes ever see any recovery in a class action; even in those cases that settle, individuals are usually offered small recoveries, and evidently few class members find it worth their while to submit claims for such paltry payouts. Other settlements offer "benefits"—such as injunctive relief or donations to charities—that in fact have little value to individuals.

Although the value of class actions is premised on the economies of scale that may be reached by aggregating low-value claims, achieving those economies does not require slow and costly class-wide proceedings in court. Rather, there are a number of ways for individual claimants to economize on the costs of proving their claims in individual arbitration proceedings. And individual arbitration proceedings are consistent with the deterrent purposes of litigation and the need for fairness to all parties.

In sum, class-wide proceedings do not deliver on the promises that their proponents have made. Conditioning the enforcement of arbitration proceedings on requiring class proceedings will harm consumers by eliminating arbitration and relegating them to a judicial system that completely precludes litigation of the

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[155] Class arbitration is an irrational choice for both businesses and consumers. First, class arbitration, by contrast, is every bit as burdensome, expensive, and time-consuming as class-action litigation, if not more so. Thus, as of September 2009 the AAA had opened 283 class arbitrations, *none* of which had resulted in a final award on the merits. *See* Brief of AAA as *Amicus Curiae* at 22-23, *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662 (2010) (No. 08-1198), 2009 WL 2896309. For those class arbitrations that were no longer active, the median time from filing to settlement, withdrawal, or dismissal—not judgment on the merits—was 583 days (1.6 years), and the mean was 630 days (1.7 years). *Id.* at 24.

Second, class arbitration may not provide all of the procedural protections for absent class members that are present in judicial class actions. Class arbitration therefore could lead to outcomes that are quite unfair to members of the class.

relatively small individualized claims that make up the majority of consumer injuries and provides no real-world benefit to consumers through the mechanism of class actions.

III. The Bureau Should Not Even Consider Regulations Overturning The Federal Arbitration Act Without Clear Empirical Evidence Of Consumer Harm—And That Evidence Does Not Exist.

Arbitration of consumer disputes has been common practice for over two decades. There are perhaps hundreds of millions of consumer contracts currently in force that include arbitration agreements—many of them relating to consumer financial products or services.

The system we have today of resolving disputes fairly and efficiently in arbitration stands in stark contrast to the court-centric views of earlier times. "Until the early twentieth century, courts in the United States displayed a marked hostility to predispute arbitration agreements," which they considered "illegal attempts to oust courts of their jurisdiction."[156] But Congress concluded that arbitration was beneficial for individuals and businesses alike, and therefore enacted the Federal Arbitration Act (9 U.S.C. §§ 1-16) to ensure that arbitration agreements were enforceable. As Justice Stephen Breyer has observed, "Congress, when enacting th[e FAA], had the needs of consumers, as well as others, in mind."[157]

The criticisms of arbitration being made today resemble those that were rampant at the time Congress enacted the FAA—they are based on false stereotypes rather than reality. Claims about the benefits of the judicial system are based on similar illusions, grounded in the hyper-idealized theory learned in law school rather than the stark reality of what actually happens today in our nation's courts.

And these unsupported, and unsupportable, arguments are being promoted by well-funded interest groups pursuing their own interests, and not the interests of

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[156] Rutledge, 6 Geo. J.L. Pub. Pol'y at 552 (citing 1 Ian R. Macneil et al., *Federal Arbitration Law: Agreements, Awards, and Remedies under the Federal Arbitration Act* § 4.3.2.2 (1996)).

[157] *Allied-Bruce Terminix*, 513 U.S. at 280. *See also* S. Rep. No. 68-536, at 3 (1924) ("The settlement of disputes by arbitration appeals to big business and little business alike, to corporate interests *as well as to individuals*.") (emphasis added).

consumers. According to the Associated Press, for example, one of the "[t]op lobbying goals" of the American Association for Justice (formerly the Association of Trial Lawyers of America, or "ATLA") has been to convince "Congress and [President] Obama to outlaw mandatory binding arbitration in consumer contracts."[158] As we have discussed, the individuals who benefit most from arbitration—***the majority of consumers and employees whose individualized claims are too small to be of interest to contingency-fee-driven plaintiffs' lawyers, and too fact-specific to be included in class actions***—would be left with no recourse. Yet plaintiffs' lawyers are willing to trade those individual consumers' claims away so that they may continue to pursue class actions that allow them to reap large fee awards while leaving class members with pennies on the dollar—if anything at all.

In carrying out the Dodd-Frank Act's mandate to study arbitration, the Bureau must ignore false stereotypes, caricatures, and selective anecdotes and focus instead on the realities of arbitration and the realities of the judicial system. Any regulation the Bureau may adopt must be based on a conclusion that "such a prohibition or imposition of conditions or limitations is in the *public interest and for the protection of consumers*. The findings of such a rule *shall be consistent with the study conducted under subsection (a)*."[159] Because the Bureau's rulemaking authority requires it to consider "the potential benefits and costs to consumers and [regulated businesses],"[160] the study must do so as well.[161]

As we have explained, the relevant evidence demonstrates overwhelmingly that arbitration serves the interests of individuals and businesses alike by providing access to justice quickly, fairly, and at low cost. Eliminating arbitration, or imposing regulations that would have that effect, will harm consumers by eliminating this critically important method of adjudicating disputes that simply cannot be resolved practically in court.

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[158] Sharon Theimer & Pete Yost, *The Influence Game: Lobbyists adapt to power shift*, USA Today, Nov. 14, 2008, http://usatoday30.usatoday.com/news/washington/2008-11-14-567071791_x.htm?csp=34.

[159] 12 U.S.C. § 5518(b) (emphasis added).

[160] *Id.* § 5512(b)(2)(A)(i).

[161] Courts rigorously oversee an agency's assessment of costs and benefits. *See, e.g., Bus. Roundtable v. SEC*, 647 F.3d 1144 (D.C. Cir. 2011).

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We thank you for your consideration of these comments and would be happy to discuss these issues further with the Bureau's staff.

Sincerely,

David Hirschmann
President and Chief Executive Officer
Center for Capital Markets Competitiveness
U.S. Chamber of Commerce

Lisa A. Rickard
President
U.S. Chamber Institute for Legal Reform

Attachment